Supreme Court, U.S.
FILED

No. 10-151

JUL 27 2010

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In The
Supreme Court of the United States

LARRY DEPEE, a California Highway Patrol Officer, and the STATE OF CALIFORNIA,

Petitioners,

v.

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of John Joseph Wayne Watkins,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Farrar v. Hobby*, 506 U.S. 103 (1992), this Court held that, when a plaintiff sues for money damages in a civil rights action under 42 U.S.C. § 1983, but receives only nominal damages, the plaintiff generally is entitled to no attorney fees under 42 U.S.C. § 1988. In the decision below, the plaintiff brought a civil rights action for money damages (more than $10 million) but received only nominal damages ($2). The plaintiff did not seek or obtain declaratory relief, an injunction, or relief for a class; the verdict caused no change in government policy; and the government agency investigated the incident and exonerated the police officer involved in it. Nevertheless, the Ninth Circuit upheld an attorney fee award of nearly $137,000 on the grounds that the civil right at issue was "important" and that the verdict alone might deter public officials from future civil rights violations. The question presented is:

When a civil rights plaintiff seeks substantial money damages but receives only nominal damages, may the court award attorney fees under 42 U.S.C. § 1988, notwithstanding the failure of the litigation to achieve a significant public benefit such as declaratory, injunctive, or class relief?

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of Larry Depee, a California Highway Patrol Officer, and the State of California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 593 F.3d 1054 (9th Cir. 2010) and is reproduced at Appendix A (App. 1-21). The fee opinion and order of the U.S. District Court for the Northern District of California is not officially reported; it is reproduced at Appendix B (App. 22-31). Both sides petitioned for rehearing by the appellate panel, and for rehearing *en banc*, and the Court of Appeals denied both petitions on April 28, 2010 in an unpublished order that is reproduced at Appendix C (App. 32-33).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit sought to be reviewed was entered on February 1, 2010. The timely petitions for rehearing and for *en banc* hearing were denied on April 28, 2010 in an order reproduced at Appendix C (App. 32-33). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely pursuant to

28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3 because it is filed within 90 days after the denial of a timely petition for rehearing.

STATUTORY PROVISION INVOLVED

The relevant statutory provision involved is 42 U.S.C. § 1988(b), which states:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT

1. The Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, provides that "the court, in its discretion, may allow the prevailing party, other than

the United States, a reasonable attorney's fee as part of the costs. . . ." In *Farrar v. Hobby*, 506 U.S. 103, 112 (1992), this Court held that a plaintiff who wins nominal damages is a prevailing party under § 1988. But the Court also ruled that when recovery of money damages is the purpose of civil rights litigation, and the plaintiff wins only nominal damages, "the only reasonable fee is usually no fee at all." *Id.* at 115. The Court emphasized that "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Id.* at 114, *quoting Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). "In a civil rights action for damages, . . . the awarding of nominal damages . . . highlights the plaintiff's failure to prove actual, compensable injury." *Id.* at 115. The Court admonished the lower courts that "fee awards under § 1988 were never intended to 'produce windfalls to attorneys,'" *ibid., quoting Riverside v. Rivera*, 477 U.S. 561, 580 (1986), and upheld the circuit court's denial of a fee award to the plaintiff in that case. *Farrar*, 506 U.S. at 115.

Justice O'Connor joined in the Court's opinion and judgment but wrote separately to explain more fully her reasoning. *Id.* at 116 (O'Connor, J., concurring). In so doing, she noted the "substantial difference between the judgment recovered and the recovery sought" by the plaintiff: Farrar asked for $17 million but recovered only one dollar, which strongly suggested his victory was merely technical or *de minimis*. *Id.* at 121 (O'Connor, J., concurring). "When the plaintiff's success is purely technical or *de minimis*,

no fees can be awarded." *Id.* at 117 (O'Connor, J., concurring). "[T]he technical or *de minimis* nature of Joseph Farrar's victory is readily apparent: He asked for a bundle and got a pittance." *Id.* at 120 (O'Connor, J., concurring).

Justice O'Connor suggested, however, that two other factors might justify attorney fees when a plaintiff recovers only nominal damages: first, "the significance of the legal issue on which the plaintiff claims to have prevailed," and second, whether the litigation "accomplished some public goal other than occupying the time and energy of counsel, court, and client." *Id.* at 121-122.

2. Respondent Sylvia Mahach-Watkins is the mother of decedent John Watkins. Petitioner Larry Depee is an officer of the California Highway Patrol (CHP), an agency of petitioner State of California. Officer Depee shot and killed John Watkins during a struggle in December 2003. The Court of Appeals noted that "Watkins was unemployed and had a long history of schizophrenia, accompanied by drug and alcohol abuse." App., *infra*, 3.

The case proceeded to trial on three claims: (1) Mahach-Watkins's own § 1983 claim under the Fourteenth Amendment to the United States Constitution, (2) plaintiff's § 1983 claim on behalf of John Watkins's estate for violation of his Fourth Amendment rights, and (3) Mahach-Watkins's wrongful death claim under state law. The jury found against the plaintiff on her own § 1983 Fourteenth Amendment

cause of action, but found liability against Officer Depee on the estate's § 1983 cause of action and on the state wrongful death cause of action. In the damages phase of trial, however, the jury awarded only nominal damages of one dollar on the § 1983 Fourth Amendment claim and one dollar on the state wrongful death claim. The jury awarded the plaintiff no punitive damages. *Id.* at 2, 6, 12-13. No other relief was sought by, or awarded to, the plaintiff.

Plaintiff filed a motion for attorney fees pursuant to 42 U.S.C. § 1988, seeking a total of $686,796.74 in fees. Defendants conceded that under this Court's holding in *Farrar*, the plaintiff was the "prevailing party" and thus met the minimum eligibility requirements for a fee award under § 1988 because of her nominal verdict on the § 1983 Fourth Amendment claim. But defendants argued that, under the reasoning of *Farrar*, plaintiff should not recover any fees. The district court disagreed, relying on the two factors from Justice O'Connor's concurrence in *Farrar*, the "significance of the legal issue on which the plaintiff claims to have prevailed" and whether the litigation "accomplished some public goal." App., *infra*, 24. However, the district court ruled that the plaintiff's attorney fees "should be significantly reduced in light of plaintiff's limited success" and awarded $136,687.35. *Id.* at 26, 28.

3. The Ninth Circuit affirmed. *Mahach-Watkins v. Depee*, 593 F.3d 1054 (9th Cir. 2010), App., *infra*, 1-21. After citing the district court's discretion under 42 U.S.C. § 1988 to award "a reasonable attorney's

fee" to the prevailing party, and noting that a plaintiff who receives a nominal damage award for a § 1983 claim is a prevailing party according to this Court's holding in *Farrar*, the Court of Appeals acknowledged the Court's admonition that "'[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.'" *Id.* at 10-11, *quoting Farrar*, 506 U.S. at 115. The court cited the "general rule" in the Ninth Circuit, "derived from Justice O'Connor's concurrence in *Farrar*," that a district court which chooses to award fees to a nominal damages plaintiff "must point to some way in which the litigation succeeded, *in addition* to obtaining a judgment for nominal damage." *Id.* at 11, *citing Wilcox v. City of Reno*, 42 F.3d 550, 555 (9th Cir. 1994) (emphasis in *Wilcox*).

The court stated "[t]here are three factors a district court should consider in determining whether a plaintiff succeeded in some way beyond the judgment for nominal damages." App., *infra*, 11. First, "the court should consider '[t]he difference between the amount recovered and the damages sought,' which in most nominal damage cases will disfavor an award of fees." *Ibid.*, *quoting Farrar*, 506 U.S. at 121 (O'Connor, J., concurring). But the Ninth Circuit did not, in fact, consider this difference, for two reasons. First, the court noted that the plaintiff did not specify an amount of damages in her

complaint. App., *infra*, 12.[1] The court overlooked the facts that the plaintiff attached to her complaint a government claim seeking $10 million in damages, and incorporated that claim in her complaint (CR 12; ER at 9, 32), and at trial, she argued to the jury for compensatory damages of $10 million, plus punitive damages. (CR 243; ER at 298.) The court also reasoned that the district court had, as a matter of law, instructed the jury that it could award nominal damages of no more than one dollar on the estate's § 1983 claim. App., *infra*, 12. Notably, this instruction was given at the close of trial, after the district court had rejected the plaintiff's argument that she was legally entitled to compensatory damages, and the district court put no limit on the amount of punitive damages the jury could award. The jury returned a verdict of one dollar in nominal damages and declined to punish Officer Depee with an award of punitive damages. *Id.* at 12-13. Nevertheless, according to the Ninth Circuit, the disparity between the money that plaintiff sought and the nominal award only "somewhat disfavors an award of attorney's fees." *Id.* at 15.

The court then looked to the two additional factors discussed by Justice O'Connor in *Farrar*, the

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[1] This is due to the fact that this action was removed by the defendants to federal court after the plaintiff filed it in state court, where the court rules prohibit plaintiffs from pleading a specific dollar amount in a personal injury or wrongful death complaint. Cal. Code Civ. Proc. § 425.10(b).

first of which is the "significance of the legal issue" on which the plaintiff claims to have prevailed. "We have difficulty imagining a more important issue than the legality of state-sanctioned force resulting in death." *Id.* at 16. The court therefore ruled that this second factor supported the fee award. *Ibid.*

Finally, the court considered the other factor discussed by Justice O'Connor in her concurrence, whether the plaintiff accomplished some "public goal." The Court of Appeals recognized that the undisputed evidence showed the CHP had not been forced by this lawsuit to change any of its policies or practices (which had not been found constitutionally deficient in any respect) and that Officer Depee had not been disciplined for this shooting, which was deemed by the CHP's own investigation to be within policy. *Id.* at 17-18.[2] Dismissing this uncontested evidence, the court said: "We are unwilling to conclude that no public goal was served by Mahach-Watkins's § 1983 verdict merely because the CHP disagreed with the jury's conclusion that its officer used excessive force in

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[2] Petitioners provided this evidence to the trial court specifically to address the "public goal" factor because Ninth Circuit precedents had identified these considerations as possible justifications for a fee award under the "public goal" rationale. *See Wilcox*, 42 F.3d at 555 (lawsuit sparked change in unconstitutional police department policy, yielded finding with collateral estoppel effects in other cases, and prompted discipline against defendant officer); *Friend v. Kolodzieczak*, 72 F.3d 1386, 1390 (9th Cir. 1995), *cert. denied*, 516 U.S. 1146 (1996) (class action lawsuit resulted in jail policy changes).

violation of the Fourth Amendment, and because the CHP has refused either to discipline the officer or to change its policies." *Id.* at 18. Instead, the court assumed "that the jury's verdict will likely deter defendant Depee from engaging in future unconstitutional conduct." *Id.* at 19. The court thus concluded that the third factor favored an award of attorney fees. *Ibid.*

Both the plaintiff and the defendants petitioned for rehearing by the Ninth Circuit panel, and for *en banc* rehearing (the plaintiff was dissatisfied with the size of the fee award granted by the district court). On April 28, 2010 the Court of Appeals denied both petitions. *See* App., *infra*, 32-33.

REASONS FOR GRANTING THE PETITION

The Court should grant review because the decision below conflicts with this Court's decision in *Farrar* and conflicts with other decisions by the circuit courts. The lower courts are struggling with *Farrar*. Eighteen years after that decision, several circuits have developed tests that are based on differing views of the standard, particularly the factors discussed by Justice O'Connor in her concurrence. No other member of the Court joined Justice O'Connor at the time, and the Court has not examined the additional factors in her concurrence in any case after *Farrar*, leaving the lower courts with little guidance. The result is a growing body of case law that is

notable for both its doctrinal confusion and its inconsistent outcomes. Further guidance from this Court is needed to resolve the confusion among the lower courts and to clarify when it is appropriate to make exceptions to *Farrar*'s presumption that nominal damage plaintiffs should receive no attorney fees.

A. The Decision Below Conflicts with *Farrar v. Hobby*

The decision below extends a growing line of cases that narrow *Farrar*.

1. The core lesson of *Farrar* is that, when considering an application for attorney fees, the district court must give primacy to the degree of the plaintiff's success in achieving the purposes of the litigation. The Court in *Farrar* reiterated its prior pronouncements that "'the degree of the plaintiff's overall success goes to the reasonableness' of a fee award under *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)." *Farrar*, 506 U.S. at 114; *accord, Texas State Teachers Assn. v. Garland Ind. School Dist.*, 489 U.S. 782 (1989). "Indeed, 'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Farrar*, 506 U.S. at 114, *quoting Hensley*, 461 U.S. at 436. In measuring the plaintiffs' success in *Farrar*, the Court remarked that they had received nominal damages instead of the $17 million in compensatory damages they had asked for, concluding that the "litigation accomplished little beyond giving

petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way." *Ibid., quoting Hewitt v. Helms*, 482 U.S. 755, 762 (1987).

The Court went on to say that when the plaintiff has achieved limited success in the litigation, the usual method of determining a reasonable attorney fee award by multiplying attorney hours spent times a reasonable hourly billing rate to reach the lodestar may yield an excessive fee award. *Farrar*, 506 U.S. at 114. "'Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.'" *Farrar*, 506 U.S. at 114, *quoting Riverside*, 477 U.S. at 585 (Powell, J., concurring in judgment). Having thus "considered the amount and nature of damages awarded," the district court may be justified in deciding the plaintiff "should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party." *Farrar*, 506 U.S. 115. This is because an element of the § 1983 plaintiff's cause of action is that she suffered actual, compensable harm, and that she is entitled to recover for that harm. As the Court explained: "In a civil rights suit for damages, however, the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable

injury." *Farrar*, 506 U.S. at 115.[3] Thus, the Court concluded: "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief [citation omitted], the only reasonable fee is usually no fee at all." *Farrar*, 506 U.S. at 115.

2. Rather than give "primary consideration" to a comparison of the amount of damages sought by the plaintiff with the amount recovered at trial, the Ninth Circuit minimized the issue. The court noted that the plaintiff's complaint did not specify the amount of damages claimed. App., *infra*, 12. The court also observed that the trial judge had rejected the plaintiff's argument that she was entitled to recover compensatory damages for the estate on its § 1983 death claim, and instructed the jury that it could award no more than nominal damages on that claim, plus punitive damages. *Id.* at 12-13. But the circuit court suggested this result weighed in favor of an attorney fee award because the "jury returned a verdict of one dollar, the maximum allowed under the instruction." *Id.* at 12. This analysis failed to accord proper weight to this "most critical factor" as mandated by *Farrar*.

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[3] Justice O'Connor in her concurrence also emphasized this point. "When the plaintiff's success is purely technical or *de minimis*, no fees can be awarded. Such a plaintiff either has failed to achieve victory at all, or has obtained only a Pyrrhic victory for which the reasonable fee is zero." *Farrar*, 506 U.S. at 117 (O'Connor, J., concurring).

The circuit court simply avoided the fact that the plaintiff sought $10 million, plus punitive damages. Plaintiff attached to and incorporated into her complaint a government claim for $10 million. (CR 12; ER at 9, 32.) In her closing argument at trial, plaintiff's counsel asked for a compensatory damages award of $10 million, plus an additional unspecified amount of punitive damages against Officer Depee. Despite this Court's admonition in *Farrar*, the district court's order awarding fees to plaintiff failed to discuss this huge discrepancy between the amount of damages sought and the nominal verdict achieved. *See* App. B, *infra*, 23-26.[4]

The similarity between *Farrar* and the present case is striking: plaintiffs in *Farrar* asked for $17 million and won only one dollar, while plaintiff here sought $10 million but received only one dollar on her § 1983 claim. As Justice O'Connor observed, "[i]t is hard to envision a more dramatic difference" between the amount sought and the amount won. *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring). By minimizing this disparity, the decision below narrows the central holding in *Farrar*.

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[4] The district court gave no more than passing mention to this "primary consideration," without any discussion, saying "the Court rejects defendants' contention that fees should be denied due to the discrepancy between the damages sought and the damages awarded." App., *infra*, 26 The court's order failed to even note that a very sizable discrepancy existed.

3. The circuit court further narrowed *Farrar* by expansively interpreting the two other factors discussed in Justice O'Connor's concurrence, which, as discussed below, have driven much of the case law.

a. With respect to the first factor, the "significance of the legal issue," the court said: "We have difficulty imagining a more important issue than the legality of state-sanctioned force resulting in death." App., *infra*, 16. This approach, unfortunately, lacks limiting principles. Everybody can agree that wrongful death is an important issue. But the result here is that the general presumption against attorney fees in *Farrar* does not apply in wrongful death cases because, by nature, wrongful death is a significant legal issue. Under this logic, any civil right could be deemed important. *Cf. Guy v. City of San Diego*, ___ F.3d ___, 2010 WL 2403761 (9th Cir. 2010) (awarding attorney fees in nominal verdict case where police arrested plaintiff during a fight outside a bar, and may or may not have used excessive force that resulted in plaintiff being sprayed with pepper spray and receiving cuts and bruises).

Additionally, the courts have not applied this factor consistently. The court below and some other circuits have interpreted the "significance of the legal issue" to refer to the general legal importance of the plaintiff's successful § 1983 claim. *See Mercer v. Duke Univ.*, 401 F.3d 199, 206 (4th Cir. 2005) ("This factor is concerned with the general legal importance of the issue on which the plaintiff prevailed."); *Maul v. Constan*, 23 F.3d 143, 145 (7th Cir. 1994) ("[W]e

understand the second *Farrar* factor to address the legal import of the constitutional claim on which plaintiff prevailed."). In other circuits, however, those vague terms have been construed to require examination of the extent to which the plaintiff succeeded on her theory of liability, compared to other claims on which she lost. *See Barber v. T. D. Williamson, Inc.*, 254 F.3d 1223, 1230-1231 (10th Cir. 2001) (reviewing the cases across the nation and noting that this factor "has received different treatment in different courts"); *Cartwright v. Stamper*, 7 F.3d 106, 110 (7th Cir. 1993) (the second factor "looks not at the relief obtained but to the extent the plaintiffs succeeded on their theory of liability"). If the Court of Appeals here had construed "the significance of the legal issue" in this fashion, the outcome might well have been different. Plaintiff in this case pled seventeen causes of action altogether, and after pretrial motions disposed of most of those claims, she obtained a liability verdict on only two claims. At trial she lost on what was arguably her central liability theory, violation of her own Fourteenth Amendment due process rights by the wrongful killing of her son (a theory which, had she won, would have allowed her to argue for a broad range of wrongful death damages), and prevailed on only the estate's Fourth Amendment cause of action and the state law claim, for which she won merely a nominal damages verdict.

b. Similarly, the court below undercut *Farrar* when it held that plaintiff had achieved a "public goal." *Farrar*, 506 U.S. at 121-122 (O'Connor, J.,

concurring). The court acknowledged that this lawsuit had not resulted in a declaration that any CHP policy was unconstitutional, nor had it prompted CHP to take disciplinary action against Officer Depee (whom CHP's own investigation of the shooting had exonerated). App., *infra*, 17-18. Nevertheless, the court stated it was "unwilling to conclude that no public goal was served by Mahach-Watkins's § 1983 verdict merely because the CHP disagreed with the jury's conclusion that its officer used excessive force in violation of the Fourth Amendment, and because the CHP has refused either to discipline the officer or to change its policies." *Id.* at 18. The court did not explain why CHP should be faulted for "refusing" to change policies which were not declared unconstitutional, or for rejecting punishment for an officer who acted in compliance with those policies (and whom the jury itself declined to sanction with punitive damages). The court simply said that the "jury's verdict will likely deter defendant Depee from engaging in future unconstitutional conduct" and would act as "a deterrent to . . . others who establish and implement official policies governing arrests of citizens." *Id.* at 19.

There is no evidence in the record to support these speculative conclusions. It is also difficult to see how such a finding could not be made in any case where the plaintiff wins nominal damages, given that a nominal damage award presupposes a liability verdict. "Where a plaintiff proves a violation of constitutional rights, nominal damages must be awarded as

a matter of law." *Cummings v. Connell*, 402 F.3d 936, 944 (9th Cir. 2005). The alleged deterrent value of such a finding thus cannot supply the "something more" necessary for a fee award, because "a finding of a constitutional violation will always be present in a civil rights case where nominal damages have been awarded." *Benton v. Oregon Student Assistance Comm'n*, 421 F.3d 901, 908 (9th Cir. 2005), *citing Farrar*, 506 U.S. at 120 (O'Connor, J., concurring). The Ninth Circuit's rationale thus seems adequate to award attorney fees to almost any nominal damage plaintiff – a result which would effectively reverse *Farrar*'s presumption that such plaintiffs should not be awarded fees.[5]

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[5] The circuit court's deterrence rationale also seems at odds with this Court's pronouncement in *Memphis Community School Dist v Stachura*, 477 U S. 299, 310 (1986): "Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations." If an award of compensatory damages, which the plaintiff here failed to achieve, is presumed to have a deterrence value, it would seem untenable if not illogical to find that a purely symbolic verdict of nominal damages would have the same deterrence value when "the awarding of nominal damages . . . highlights the plaintiff's failure to prove actual, compensable injury." *Farrar*, 506 U.S. at 115.

B. The Lower Courts Have Not Interpreted and Applied *Farrar v. Hobby* Consistently, and the Ninth Circuit's Ruling in This Case Conflicts with Decisions of the Seventh and Eighth Circuits

In the nearly two decades since *Farrar*, the circuits have produced a body of case law with widely divergent standards and outcomes, displaying the lower courts' confusion in construing *Farrar* and, in particular, the two factors discussed in Justice O'Connor's concurrence.

1. The inconsistency is illustrated by the lower courts' attempts to state the applicable rule. In *Pino v. Locascio*, 101 F.3d 235, 238 (2d Cir. 1996), the Second Circuit stated: "In short, while there is no per se rule that a plaintiff recovering nominal damages can never get a fee award, *Farrar* indicates that the award of fees in such a case will be rare." Similarly, the Eleventh Circuit in *Gray v. Bostic*, 570 F.3d 1321, 1326 (11th Cir. 2009), held: "Plaintiffs in nominal-damage cases should not be awarded attorney's fees in any but exceptional circumstances." The First Circuit, on the other hand, takes a much more liberal view, making fee awards in nominal verdict cases nearly automatic. *See Diaz-Rivera v. Rivera-Rodriguez*, 377 F.3d 119, 124 (1st Cir. 2004): "[A]lthough this fee-shifting provision [42 U.S.C. § 1988] is couched in permissive terminology, awards in favor of prevailing civil rights plaintiffs are virtually obligatory." The governing approach of the Second and Eleventh Circuits – declaring that attorney fee awards to

nominal damage plaintiffs should be "rare" or "exceptional" – is much more faithful to *Farrar* than the First Circuit's "virtually obligatory" formulation, which inverts this Court's presumption that for a plaintiff who wins only nominal damages, "the only reasonable fee is usually no fee at all." *Farrar*, 506 U.S. at 115.

2. The lower courts have also demonstrated confusion on the meaning of Justice O'Connor's reference to the "significance of the legal issue." *Id.* at 121 (O'Connor, J., concurring). A number of courts have construed the "significance of the legal issue" to mean the abstract legal importance of the constitutional issue litigated and declared a given issue to be sufficiently important to merit a fee award to a plaintiff who otherwise would have been denied fees under the *Farrar* majority's ruling. *See, e.g., Piper v. Oliver*, 69 F.3d 875, 877 (8th Cir. 1995) (noting that the plaintiff's "right to be free from illegal detention was a significant one"); *Diaz-Rivera*, 377 F.3d at 124-125 (violation of plaintiffs' due process rights; litigation "settled a significant issue whose resolution benefitted the plaintiffs and the public"); *Mercer*, 401 F.3d at 206 (right to be free from discrimination in school sponsored contact sports); *Jones v. Lockhart*, 29 F.3d 422, 424 (8th Cir. 1994) (right to be free from cruel and unusual punishment).

These decisions are in tension with other circuit decisions where the courts have judged the legal issue on which the plaintiff prevailed to be insufficiently significant to justify a fee award. *See, e.g., Boston's Children First v. City of Boston*, 395 F.3d 10 (1st Cir.

2005) (school district's unlawful assignment of student plaintiffs to schools on basis of their race not a victory on a significant legal issue); *Pouillon v. Little*, 326 F.3d 713 (6th Cir. 2003) (circuit court overturned district court fee award based on plaintiff's vindication of his First Amendment right to protest on city hall steps); *Gray v. Bostic*, 570 F.3d 1321 (attorney fee award vacated; violation of nine-year-old child's Fourth Amendment rights by handcuffing her for punitive purposes not significant legal issue). In *Maul v. Constan*, 23 F.3d at 145-146, the Seventh Circuit acknowledged that the issue on which the plaintiff there prevailed – whether an inmate is entitled to a hearing before administration of antipsychotic drugs against his wishes – was "clearly a significant constitutional question," but it reasoned that this was the least important of the *Farrar* factors and therefore denied attorney fees to the plaintiff. The Second Circuit has adopted a similarly restrictive interpretation of this factor, stating in *Pino v. Locascio*, 101 F.3d at 239: "The vast majority of civil rights litigation does not result in ground-breaking conclusions of law, and therefore, will only be appropriate candidates for fee awards if a plaintiff recovers some significant measure of damages or other meaningful relief." This statement cannot be squared with the reasoning of the Eighth Circuit, which upheld a fee award to an inmate plaintiff because "civil rights litigation serves an important public purpose" by vindicating a policy Congress believed to be important. *Jones*, 29 F.3d at 424.

These irreconcilable statements by the Second and Eighth Circuits demonstrate the need for this Court to clarify the relevance and meaning of this factor. At some level, all civil rights are important, but there are no firm principles to determine how this factor influences whether a nominal verdict plaintiff is entitled to attorney fees. This case is a good example. The Ninth Circuit required only a brief paragraph to analyze this issue before rendering the *ipse dixit* conclusion that the plaintiff had prevailed on the "significant" issue of "the legality of state-sanctioned force resulting in death." App., *infra*, 16.

3. The "public goal" factor has likewise received disparate treatment by the circuit courts. *See Barber*, 254 F.3d at 1231-1232. The Second Circuit, again, takes a restrictive view of this factor in deciding whether to award attorney fees to nominal damage plaintiffs, noting that "not every tangential ramification of civil rights litigation *ipso facto* confers a benefit on society." *Pino*, 101 F.3d at 239; *but see Cabrera v. Jakabovitz*, 24 F.3d 372 (2d Cir.), *cert. denied*, 513 U.S. 876 (1994) (fee award appropriate because plaintiff prevailed on a novel issue of law). The Seventh Circuit similarly concluded that a lawsuit did not serve a public purpose because the "plaintiff brought suit only on his own behalf, alleging only violations of his own rights" and seeking redress for his injuries only. *Maul*, 23 F.3d at 146. Other courts have adopted a broader reading of this factor, holding that a public goal is accomplished if the plaintiff's victory encourages attorneys to represent civil rights

litigants, affirms an important right, puts the defendant on notice that it needs to improve, or provokes a change in the defendant's policies or conduct. *See, e.g., O'Connor v. Huard*, 117 F.3d 12, 17-18 (1st Cir. 1997) (plaintiff's victory was not *de minimis* because it provided an incentive to attorneys to represent civil rights litigants and served as a deterrent to future abuses); *Muhammad v. Lockhart*, 104 F.3d 1069, 1070 (8th Cir. 1997) (plaintiff's nominal verdict "accomplished a public goal, namely, encouraging governments scrupulously to perform their constitutional duties"); *Piper*, 69 F.3d at 877 ("a public goal had been served by [the plaintiff's] victory in encouraging [defendants] to refashion their forfeiture procedures to avoid future illegality"); *Koopman v. Water Dist. No. 1 of Johnson County, Kansas*, 41 F.3d 1417, 1421 (10th Cir. 1994), *cert. denied*, 516 U.S. 965 (1995) (plaintiff's victory established basic rights for public employees holding a similar property interest).

As illustrated by these cases, the lower courts have been no more consistent in their interpretation and application of Justice O'Connor's "public goal" factor than they have been in utilizing "the significance of the legal issue" as a touchstone for awarding attorney fees. The circuits have found enough flexibility in this factor to uphold fee awards on the ground that a nominal damages verdict would "encourage" the government to be scrupulous in protecting civil rights, *Muhammad*, 104 F.3d at 1070, and to "avoid future illegality," *Piper*, 69 F.3d at 877. Such loose invocations of the public goal factor, in which

courts simply assume that a mere nominal damages judgment will alter a defendant's behavior without requiring any proof in the record, could justify a fee award nearly every time a plaintiff wins a nominal damages verdict. (The Ninth Circuit adopted just such a method in the present case by upholding the district court's "finding," without any evidentiary basis, that "the jury's verdict will likely deter defendant Depee from engaging in future unconstitutional conduct." App., *infra*, 18-19.)[6] But that result would effectively render *Farrar* a dead letter. In order to be faithful to *Farrar*'s injunction to avoid windfall awards to attorneys, *Farrar*, 506 U.S. at 115, the "public goal" factor (if adopted by the Court) should be more precisely construed to apply where the plaintiff obtains a litigation result that realistically benefits a class of litigants or the public at large. *See, e.g., Lowry v. Watson Chapel School Dist.*, 540 F.3d 752, 765 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 1526 (2009) (fee award upheld where plaintiffs obtained

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[6] Another Ninth Circuit panel, in a published opinion, recently reversed the district court's denial of attorney fees to a plaintiff who won a nominal damages verdict against a police officer for using excessive force in violation of the Fourth Amendment. *Guy v City of San Diego*, ___ F.3d ___, 2010 WL 2403761 (9th Cir. 2010). Despite the absence of any evidence showing the San Diego police department had changed its policies or disciplined the defendant officer as a result of this lawsuit, the circuit panel made its own finding that the *attorney fee award* itself (not the nominal verdict) "serves a purpose beneficial to society" by encouraging the city to ensure its officers are well trained to avoid using excessive force.

nominal damages for violation of free speech rights and permanent injunction benefiting all students in the school district); *Phelps v. Hamilton*, 120 F.3d 1126, 1131-1133 (10th Cir. 1997) (plaintiffs entitled to attorney fee award because they obtained declaratory judgment invalidating state statute on constitutional grounds, resulting in legislature amending statute).

4. More specifically, the circuits inconsistently apply *Farrar* to nominal verdicts and fee awards in police excessive force cases like the present one.

In *Milton v. Des Moines*, 47 F.3d 944 (8th Cir.), *cert. denied*, 516 U.S. 824 (1995), the plaintiff was injured during an arrest; the evidence showed he suffered blows to the head when the police beat him with their flashlights, and he incurred medical bills totaling $6,000. The plaintiff alleged excessive force in violation of his constitutional rights as well as assault and battery under state law (like the plaintiff in the present case). A number of the plaintiff's claims were dismissed before trial. The jury found one of the three defendant officers liable for use of excessive force and battery, but awarded the plaintiff only one dollar in nominal damages. While the circuit court "acknowledged that a claim of excessive force is of great public importance," and that "the civil right Milton sought to vindicate was a significant issue" (echoing Justice O'Connor's factors), it affirmed the district court's denial of attorney fees. *Id.* at 946-947.

In *Briggs v. Marshall*, 93 F.3d 355 (7th Cir. 1996), the plaintiffs got into an altercation with the

defendant policeman, and one of them was dragged by her head out of a restaurant. (The police officer was later convicted of misdemeanor battery for this incident.) The four plaintiffs filed suit under § 1983 alleging excessive force and various state law torts. *Id.* at 358-359. They asked the jury for $75,000 in compensatory damages, plus significant punitive damages, but were awarded only four dollars. The district court denied attorney fees based on *Farrar* and the Court of Appeals affirmed. Like the Ninth Circuit here, the Seventh Circuit in *Briggs* employed "the three part test from Justice O'Connor's concurrence" in *Farrar*. *Id.* at 361. Notwithstanding the acknowledged "significance of the legal issue" (excessive force in violation of the constitution), which the court deemed "the least significant" of the three factors, the court upheld the denial of attorney fees. The court's rationale could be applied verbatim to the present case: "Here . . . the plaintiffs received only nominal damages, they did not obtain an injunction prohibiting future violations, and they did not establish that the defendants' conduct was sufficiently reprehensible to warrant punitive damages." *Ibid.* (internal quotes omitted).

Yet the Ninth Circuit in the decision below affirmed a fee award while the Seventh and Eighth Circuits denied fees in *Milton* and *Briggs*. No principled distinctions can be drawn to explain the different outcomes: all three cases arose from police use of force against citizens which juries found to be excessive and in violation of the Fourth Amendment, albeit

unworthy of an actual damage award, and each plaintiff's vindication was acknowledged by all three circuits to be significant and important to the public. To be sure, the present case resulted in death, but the Ninth Circuit also awarded attorney fees in *Guy*, where the plaintiff's struggle with police officers resulted in relatively minor injuries (cuts, bruises, and pain from pepper spray), and the court admitted that it was unclear whether the police or the plaintiff himself had caused the injuries. *Guy*, ___ F.3d ___, 2010 WL 2403761.

5. Finally, the issue here is significant and recurring. As shown in the foregoing analysis, dozens of circuit decisions have attempted to apply *Farrar*, either granting or denying fee awards to nominal damage plaintiffs. Most of them have looked to Justice O'Connor's concurring opinion for guidance, but there has been no consensus among the lower courts about what Justice O'Connor meant, or how to apply her suggested factors. The result is disarray among the lower courts.

Petitioners respectfully suggest that attorney fee awards to nominal damage plaintiffs should be allowed only where the litigation has accomplished some identifiable public purpose supported by the lower court's judgment – such as invalidating an unconstitutional policy of the defendant or securing injunctive, declaratory, or class relief. As in the case of enhancements to the lodestar fee award under § 1988, which the Court recently held should be "rare," *Perdue v. Kenny A.*, 130 S.Ct. 1662, 1674

(2010), attorney fee awards to plaintiffs who win only nominal damages should be reserved for the exceptional situation in which the plaintiff obtains a litigation result that benefits a class of litigants or the public at large, meriting a fee award for plaintiffs and attorneys who truly perform a public service.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 27, 2010

APPENDIX A

593 F.3d 1054

United States Court of Appeals,
Ninth Circuit.
Sylvia MAHACH-WATKINS, Individually &
as the Successor in Interest to the Estate of John
Joseph Wayne Watkins; Patricia Ann Watkins,
Plaintiffs-Appellees,
v.
Larry DEPEE, a California Highway Patrol Officer;
State of California, Defendants-Appellants.
No. 08-15694.

Argued and Submitted July 14, 2009.
Filed Feb. 1, 2010.

David Warren Hamilton, S. Michelle Inan, Office of the California Attorney General, Oakland, CA, for the appellants.

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Appeal from the United States District Court for the Northern District of California, Susan Illston, United States District Judge, Presiding. D.C. No. 3:05-cv-01143-SI.

Before: D.W. NELSON, W. FLETCHER and RICHARD A. PAEZ, Circuit Judges.

WILLIAM A. FLETCHER, Circuit Judge:

California Highway Patrol ("CHP") Officer Larry Depee ("Depee") shot and killed John Watkins ("Watkins") while on duty in Crescent City, California. Watkins's mother, Sylvia Mahach-Watkins ("Mahach-Watkins"), filed suit under 42 U.S.C. § 1983 and various provisions of state law on her own behalf and on behalf of her son's estate. A number of Mahach-Watkins's claims were dismissed before trial. Two § 1983 claims and a state-law wrongful death claim went to trial. The jury returned a favorable verdict on one of the two § 1983 claims and on the wrongful death claim. The jury awarded nominal damages of one dollar on each of these two claims.

Mahach-Watkins thereafter sought almost $700,000 in attorney's fees under 42 U.S.C. § 1988. The district court awarded $136,687.35. The court reduced the amount of attorney's fees because of the limited success achieved in Mahach-Watkins's § 1983 claim. Depee appeals the award of attorney's fees. He contends under *Farrar v. Hobby,* 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), that because of her limited success Mahach-Watkins is entitled to no attorney's fees at all.

For the reasons that follow, we affirm.

I. Background

CHP Officer Larry Depee shot and killed John Watkins during a struggle on the night of December

9, 2003. Watkins was unemployed and had a long history of schizophrenia, accompanied by drug and alcohol abuse. He survived on Social Security payments and support from his mother.

In its order denying defendants' motion for summary judgment on the § 1983 and wrongful death claims, the district court wrote:

> The parties essentially agree that, Watkins, a forty-year old American Yurok Indian man, was riding his bicycle down U.S. Highway 101 southbound in the northbound lane. Defendant Depee observed Watkins and saw that he was riding his bicycle without any lights. Depee tried to initiate a traffic stop of Watkins twice that evening but could not do so because Watkins rode away before defendant could position his patrol car for the stop.
>
> Later that evening, Depee saw Watkins a third time, riding southbound on the sidewalk next to the northbound lane of Highway 101. The parties agree that Depee parked his patrol car directly in front of Watkins. Plaintiff claims that Watkins collided with the patrol car and fell from his bicycle onto the ground, while defendants maintain that Watkins stopped, straddled his bicycle and after Depee told Watkins he could not ride the wrong way in the roadway without lights, that Watkins either shoved or threw the bicycle at Depee and started running. The parties agree that at some point after Depee stopped Watkins, Watkins

> ran away to a wooded area behind a nearby Super 8 Motel, and Depee chased him. According to Depee, he and Watkins struggled, and at some point during the fight, Watkins began yelling that he needed to go home to take his medications, and also told Depee he had a gun. Also according to Depee, Watkins wrested Depee's flashlight away from him and swung at him twice with the flashlight. After the second swing, Depee drew his gun and shot Watkins several times, killing him.
>
> Based upon, *inter alia,* the declaration of forensic pathologist John Cooper, plaintiff maintains that at the time Depee shot Watkins, Watkins was lying on his left side with his right arm raised up in a "warding off" gesture, and that Watkins could not have been swinging the flashlight at the time of his death. Plaintiff also emphasizes the fact that a fingerprint analysis of Depee's flashlight only revealed one of Watkins' fingerprints on the head area of the flashlight; plaintiff asserts that if Depee's version of events was true, there would be more of Watkins' fingerprints on the flashlight, and that those fingerprints would be on the shaft of the flashlight.

The evidence at trial was largely consistent with this narrative. Depee testified at trial that he fired two shots and that he was probably two or three feet away from Watkins when he fired. When asked why he shot Watkins, Depee replied:

> A. Well, in the end [I] shot him because he was trying to hit me with the flashlight and I definitely felt like he was trying to kill me. He said he had a gun. I don't know why else he would tell anybody you have a gun you wanted the kill them or what-have-you. The whole circumstances fighting, running, assaulting my – and then ultimately the flashlight is when I shot.
>
> Q. Why did you believe, maybe it's obvious, but tell the jury why did you believe he was trying to kill you?
>
> A. That flashlight is no doubt, to me that's a deadly weapon when you['re] swinging that flashlight somebody, to me it's painfully obvious he was trying to kill me.

After Watkins's death, Mahach-Watkins filed suit against Depee and several other defendants in state court under 42 U.S.C. § 1983 and various provisions of California law. Defendants removed to federal court. Mahach-Watkins filed an amended complaint in federal court, pleading a number of federal and state-law claims. Mahach-Watkins's § 1983 claims were contained in her Sixth Cause of Action which contained two "counts." Count 1 included an allegation of excessive force in violation of the Fourth Amendment, as well as allegations of First, Fifth, and Fourteenth Amendment violations, on behalf of Mahach-Watkins and Watkins's estate. Count 2 was an allegation of a conspiracy to violate Watkins's constitutional rights. In addition, in her Seventh Cause of Action Mahach-Watkins brought a claim under 42 U.S.C. § 1985(3)

alleging a failure to prevent civil rights violations and a conspiracy to cover up such violations. Mahach-Watkins's state-law claims included wrongful death, assault and battery, intentional infliction of emotional distress, negligence, and negligent hiring, training and retention.

After motions to dismiss, to strike, and for summary judgment, only three claims survived, as to which Depee was the sole defendant. The claims were a § 1983 Fourth Amendment claim by Mahach-Watkins, a § 1983 Fourth Amendment claim by Watkins's estate, and a state-law wrongful death claim by Mahach-Watkins. The district court held a three-week jury trial, divided into liability and damages phases. At the conclusion of the liability phase, the jury returned a verdict against Depee on the estate's § 1983 Fourth Amendment excessive force claim and Mahach-Watkins's state-law wrongful death claim.

In the damages phase, the district court instructed the jury that it could return an award of only one dollar in nominal damages on the § 1983 claim, irrespective of what the evidence showed. The court instructed the jury that it could return an award on the wrongful death claim in whatever amount the evidence supported. At the conclusion of the damages phase, the jury awarded one dollar in nominal damages on each of the two claims.

Mahach-Watkins moved for a new trial on the issue of damages on the wrongful death claim. The

district court denied the motion, explaining that in its view the evidence in support of damages was consistent with the jury's verdict. In the court's words, the evidence showed a "complicated picture of the relationship" between Watkins and his mother. Although Mahach-Watkins testified that she and her son "loved each other and had a close relationship," the evidence showed that Watkins had threatened his mother "on several occasions," that she was "afraid of him and periodically requested police assistance with him," that he "had difficulty forming any meaningful relationships," and that he "had a serious history of poorly-managed psychiatric instability."

Mahach-Watkins moved for attorney's fees and costs under 42 U.S.C. § 1988 based on the jury's favorable verdict on the § 1983 claim. She sought $686,796.74 in attorney's fees and $117,654.68 in costs. The district court tolled the time for taking an appeal in order to consider the motion for fees. The court awarded $136,687.35 in attorney's fees, reducing the requested amount due to Mahach-Watkins's limited success in her § 1983 suit. The court held that Mahach-Watkins was entitled to recover costs under Federal Rule of Civil Procedure 54, but wrote that it was unable to determine the amount without more information. The court denied the motion for costs and authorized Mahach-Watkins to file a renewed motion after the clerk taxed costs.

Depee appealed the award of attorney's fees. Mahach-Watkins did not file a timely cross-appeal.

II. Standard of Review

We review an award of attorney's fees for abuse of discretion. *Benton v. Or. Student Assistance Comm'n,* 421 F.3d 901, 904 (9th Cir. 2005). A district court abuses its discretion if it awards fees based on an erroneous view of the law or a clearly erroneous finding of fact. *Id.*

III. Discussion

This appeal presents three issues. First, Mahach-Watkins argues that because the district court had not fully resolved her motion for attorney's fees and costs when Depee filed his notice of appeal, the appeal was premature. Second, Depee argues that because Mahach-Watkins obtained only one dollar in nominal damages on the § 1983 claim, she is not entitled to attorney's fees under *Farrar v. Hobby,* 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). Third, Mahach-Watkins argues that the district court abused its discretion in reducing the amount of attorney's fees.

A. Timeliness of Appeal

Mahach-Watkins contends that Depee's notice of appeal was filed prematurely and that we therefore have no jurisdiction. We disagree.

Mahach-Watkins filed a motion for attorney's fees and costs on November 14, 2007. On November 20, 2007, she requested, pursuant to Federal Rule of Civil

Procedure 58(e), that the district court extend the time for filing an appeal until the motion was decided. The district court granted the motion. Rule 58(e) provides:

> Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

Federal Rule of Appellate Procedure 4(a)(4) provides:

> If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion. . . .

The motions referenced in Rule 4(a)(4) include a motion "for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58." Fed. R. App. P. 4(a)(4)(A)(iii). Therefore, once the district court granted Mahach-Watkins's Rule 58(e) motion, the time to file the appeal ran from the entry of the order disposing of the motion for attorney's fees.

The district court ruled on Mahach-Watkins's motion for attorney's fees on February 25, 2008. At the same time, it denied without prejudice her motion

for costs, permitting her to renew the motion after the clerk of the court had taxed costs. The resolution of the costs motion could have no effect on the resolution of the attorney's fees motion. Because the court's February 25 ruling entirely disposed of Mahach-Watkins's motion for attorney's fees, the parties had 30 days from that date to file their notices of appeal. *See* Fed. R. App. P. 4(a)(1)(A). Depee timely filed his notice of appeal on March 25, 2008.

B. Entitlement to Attorney's Fees

In an action brought pursuant to 42 U.S.C. § 1983, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . ." 42 U.S.C. § 1988(b). A plaintiff who receives a nominal damage award for a § 1983 claim is a prevailing party under § 1988. *Farrar,* 506 U.S. at 112, 113 S.Ct. 566. However, under *Farrar,* "[i]n a civil rights suit for damages . . . the awarding of nominal damages [ ] highlights the plaintiff's failure to prove actual, compensable injury." *Id.* at 115, 113 S.Ct. 566. A nominal damages award often "accomplishe[s] little beyond giving petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way." *Id.* at 114, 113 S.Ct. 566 (second alteration in original) (quoting *Hewitt v. Helms,* 482 U.S. 755, 762, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987)). Therefore, "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the

only reasonable fee is usually no fee at all." *Id.* at 115, 113 S.Ct. 566 (internal citation omitted). We follow the general rule, derived from Justice O'Connor's concurrence in *Farrar,* that "[i]f a district court chooses to award fees after a judgment for only nominal damages, it must point to some way in which the litigation succeeded, *in addition* to obtaining a judgment for nominal damage." *Wilcox v. City of Reno,* 42 F.3d 550, 555 (9th Cir. 1994) (emphasis in original).

There are three factors a district court should consider in determining whether a plaintiff succeeded in some way beyond the judgment for nominal damages. First, the court should consider "[t]he difference between the amount recovered and the damages sought," which in most nominal damages cases will disfavor an award of fees. *Farrar,* 506 U.S. at 121, 113 S.Ct. 566 (O'Connor, J., concurring). Second, the court should consider "the significance of the legal issue on which the plaintiff claims to have prevailed." *Id.* Third, the court should consider whether the plaintiff "accomplished some public goal." *Id.* We have approved of the consideration of these factors in nominal damages cases. *Cummings v. Connell,* 402 F.3d 936, 947 (9th Cir. 2005); *Benton,* 421 F.3d at 905-06. We have held that "[w]here the district court properly has weighed [these three] factors, the resulting award [of attorney's fees] is not an abuse of its discretion." *Cummings,* 402 F.3d at 947.

In awarding attorney's fees in this case, the district court wrote a careful order emphasizing the second and third factors. The court wrote that a case

resulting in a wrongful death "involves significant legal issues, serves a public purpose, and affirms important rights, regardless of the amount of damages recovered." It wrote, further, that "the constitutional rights at stake in a wrongful death case are of a different magnitude than those at issue in non-death cases, and . . . cases such as the instant one present questions of vital importance to the public." Finally, the court found "that, in addition to obtaining nominal damages, plaintiff achieved other 'tangible results' in that the jury's verdict will likely deter defendant Depee from engaging in future unconstitutional conduct."

We consider the three factors below.

1. Amount of Damages Sought and Recovered

The first factor looks to the difference between the amount of damages sought and recovered.

In her first amended complaint, Mahach-Watkins did not specify an amount of damages. Relevant to the § 1983 excessive force claim, she sought only general and punitive damages "in an amount to be determined according to proof at trial." At the end of the damages phase trial, the court instructed the jury on the § 1983 claim that, as a matter of law, it "must award nominal damages of no more than one dollar." The jury returned a verdict of one dollar, the maximum allowed under the instruction. The court also instructed the jury that it could award punitive

damages on the § 1983 claim if it found that Depee's conduct was "malicious, oppressive or in reckless disregard" of Watkins's rights. The jury declined to award punitive damages.

Mahach-Watkins had argued for a jury instruction that would have allowed the jury to award compensatory damages to her son's estate on the § 1983 excessive force claim for pain and suffering between the time he was shot and the time he died. In justifying its instruction allowing only nominal damages, the district court wrote, "The Ninth Circuit has not addressed the question of what damages are available under a Section 1983 wrongful death claim." In the absence of a Ninth Circuit holding on the point, the district court concluded that the available damages on the § 1983 excessive force claim were "those set forth in California's survival statute, Cal.Code Civ. Proc. § 377.34, [which] does not allow recovery for the decedent's loss of enjoyment of life, or the decedent's pain and suffering." Mahach-Watkins has not appealed that ruling. We therefore assume without deciding that as a matter of law compensatory damages were not available to the estate on the § 1983 excessive force claim.

In *Romberg v. Nichols,* 48 F.3d 453, 454 (9th Cir. 1995), plaintiffs had sought $2 million dollars in compensatory and punitive damages. However, in closing argument to the jury, plaintiffs requested only "some sum like one dollar." *Id.* We denied attorney's fees. We wrote, "An attorney cannot avoid *Farrar*'s mandate by waiting until the close of trial and then,

when he perceives that his clients have little chance of success, asking for only nominal damages to justify an attorney's fee award." *Id.* at 455.

The case now before us is not on all fours with *Romberg.* In *Romberg,* the plaintiffs' problem was that their evidence did not support their damages claim for $2 million dollars. Here, by contrast, Mahach-Watkins did not seek a specified amount of damages. Rather, she sought only an award of compensatory damages "according to proof at trial." Further, and more important, the district court determined that evidence of actual harm was irrelevant to Mahach-Watkins's § 1983 claim, instructing the jury as a matter of law that she was entitled to nominal rather than compensatory damages.

We do not read *Romberg* to hold that in a § 1983 case in which only nominal damages are available as a matter of law a verdict awarding such damages is less than a complete success. *See, e.g., Farrar,* 506 U.S. at 115, 113 S.Ct. 566 ("When a plaintiff recovers only nominal damages *because of his failure to prove an essential element of his claim for monetary relief,* the only reasonable fee is usually no fee at all." (emphasis added) (internal citation omitted)). But the case before us is not one in which it was clear from the outset that only nominal damages would be available as a matter of law. First, Mahach-Watkins brought several § 1983 claims. She obtained a verdict on only the excessive force claim. Second, the district court believed that the law in the Ninth Circuit was unclear as to the availability of compensatory

damages to an estate on a § 1983 excessive force claim resulting in death. Mahach-Watkins sought to persuade the district court that compensatory damages were available. She was unsuccessful in that attempt and has not appealed the district court's adverse ruling.

In sum, Mahach-Watkins sought an award of an indeterminate amount of compensatory and punitive damages on her § 1983 claims. She obtained a verdict on her § 1983 excessive force claim and then obtained an award of only nominal damages. As we discuss below, her success in achieving a liability verdict was significant, independent of any damage award. But the first factor looks only to the difference between the damages sought and obtained. In the circumstances of this case, that factor somewhat disfavors an award of attorney's fees.

2. Significance of the Legal Issue on Which Mahach-Watkins Prevailed

The second factor looks to "the significance of the legal issue on which the plaintiff claims to have prevailed." *Farrar,* 506 U.S. at 121, 113 S.Ct. 566 (O'Connor, J., concurring).

We have repeatedly noted the relevance of this second factor. *See, e.g., Benton,* 421 F.3d at 905; *Morales v. City of San Rafael,* 96 F.3d 359, 363 (9th Cir. 1996). Other circuits have also done so. *See, e.g., Mercer v. Duke Univ.,* 401 F.3d 199, 206 (4th Cir. 2005) ("This factor is concerned with the general legal

importance of the issue on which the plaintiff prevailed."); *Maul v. Constan,* 23 F.3d 143, 145 (7th Cir. 1994) ("[W]e understand the second *Farrar* factor to address the legal import of the constitutional claim on which plaintiff prevailed."); *Cartwright v. Stamper,* 7 F.3d 106, 110 (7th Cir. 1993) ("The second factor considers the significance of the legal issue on which the plaintiffs prevailed. This factor looks not at the relief obtained but to the extent the plaintiffs succeeded on their theory of liability.").

The district court emphasized the importance of the legal issue in this case, whether state-sanctioned force resulting in death was excessive. The importance of the issue may be assessed by comparing it to other issues that our sister circuits have held to qualify as important under this factor. *See, e.g., Mercer,* 401 F.3d at 206 (right to be free from discrimination in school sponsored contact sports); *Piper v. Oliver,* 69 F.3d 875, 877 (8th Cir. 1995) (right to be free from illegal detention); *Jones v. Lockhart,* 29 F.3d 422, 424 (8th Cir. 1994) (right to be free from cruel and unusual punishment). We have difficulty imagining a more important issue than the legality of state-sanctioned force resulting in death. It is obviously of supreme importance to anyone who might be subject to such force. But it is also of great importance to a law enforcement officer who is placed in a situation where deadly force may be appropriate. We therefore conclude that the second factor supports the award of attorney's fees.

3. Public Goal

The third factor looks to whether the plaintiff accomplished some public goal.

Depee contends that no public goal was accomplished because his employer, the CHP, investigated the shooting and concluded that his use of force was legally justified. Depee relies on our opinion in *Wilcox v. City of Reno,* 42 F.3d 550, 555 (9th Cir. 1994), where we wrote:

> If the [§ 1983] lawsuit achieved other tangible results – such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects – such results will, in combination with an enforceable judgment for a nominal sum, support an award of fees.

In support of Depee's opposition to an award of attorney's fees, the Chief of the CHP's Northern Division provided a sworn declaration to the district court. He stated, *inter alia*:

> Officer Larry Depee was not disciplined as a result of the shooting on December 9, 2003 or this litigation. The CHP investigation determined that Officer Depee's use of force was legally justified and consistent with CHP's use of force policy. . . .
>
> Whether or not claims of excessive force are filed, the CHP investigates every shooting incident involving an officer to review policies and practices and to determine

> issues of employee misconduct. The CHP investigated the shooting in this case. It did not alter or change any of its law enforcement policies and practices as a result of the investigation or this lawsuit. In its experience, the vast majority of excessive force complaints are fact-specific claims which, like the instant litigation, do not result in policy or practice changes.

We are unwilling to conclude that no public goal was served by Mahach-Watkins's § 1983 verdict merely because the CHP disagreed with the jury's conclusion that its officer used excessive force in violation of the Fourth Amendment, and because the CHP has refused either to discipline the officer or to change its policies. The CHP has come to its own conclusions about the legality of Depee's use of force. But the CHP's exoneration of Depee does not mean that his action was, in fact, appropriate. Indeed, we are bound to conclude otherwise, given the unappealed jury verdict that Depee used unconstitutionally excessive force in killing Watkins.

It is possible that the CHP will continue, as it has said it will, to follow its current "policies and practices" concerning the use of force despite the jury's conclusion that Officer Depee acted unconstitutionally. However, this does not mean that Mahach-Watkins's § 1983 suit, and the jury's verdict that Depee used excessive force, accomplished no public goal. With respect to Depee, the district court wrote: "The Court . . . finds that, in addition to

obtaining nominal damages, plaintiff achieved other 'tangible results' in that the jury's verdict will likely deter defendant Depee from engaging in future unconstitutional conduct." Further, the verdict had the deterrent effect we described in *Morales,* 96 F.3d at 364-65: "[T]he verdict established a deterrent to . . . others who establish and implement official policies governing arrests of citizens. Thus, it served the public purpose of helping to protect Morales and persons like him from being subjected to similar unlawful treatment in the future." The CHP's stated choice to ignore that deterrent does not minimize the importance of the case to others. We therefore conclude that the third factor favors the award of attorney's fees.

4. Summary

The core of Mahach-Watkins's suit has always been her contention that Depee acted improperly in killing her son. The jury agreed with her, holding under § 1983 that Depee used unconstitutionally excessive force. The jury's liability verdict on the § 1983 claim was hardly a hollow victory for a mother suing for the death of her son. The jury did not give Mahach-Watkins everything she asked for, but it gave her enough to entitle her to an award of attorney's fees under § 1988.

C. Size of the Award

Mahach-Watkins did not file a timely cross appeal. Despite her failure to cross-appeal, she seeks to argue that the district court abused its discretion in reducing her attorney's fees request. In his appeal, Officer Depee argues only that Mahach-Watkins is entitled to no attorney's fees. He makes no explicit argument, in the alternative, that if she is entitled to fees the district court's award is too high.

We generally require a cross-appeal when a party seeks to enlarge her substantive rights. *Doherty v. Wireless Broad. Sys.*, 151 F.3d 1129, 1131 (9th Cir. 1998). Under this rule, "we have required a cross-appeal when a party seeks to increase its monetary recovery or decrease its monetary liability." *Lee v. Burlington N. Santa Fe Ry. Co.*, 245 F.3d 1102, 1107 (9th Cir. 2001). "Because the cross-appeal requirement is a rule of practice and not a jurisdictional bar," we have "'broad power to make such dispositions as justice requires.'" *Id.* (quoting *Bryant v. Technical Research Co.*, 654 F.2d 1337, 1342 (9th Cir. 1981)). Because the issues raised by Mahach-Watkins in challenging the district court's reduction of her fee award are interrelated to the issues properly on appeal, we can consider them. *Id.* at 1107.

We are willing to consider Mahach-Watkins's argument as to the amount of fees. Because we consider her argument, we construe Officer Depee's appeal broadly to include a challenge to the amount of fees. We therefore consider the district court's fee

award from both directions. The court carefully considered the three factors derived from *Farrar* and provided a written order justifying its conclusion that a substantial reduction of the fee request was appropriate in light of Mahach-Watkins's limited success. We hold that the district court acted within its discretion in awarding $136,687.35.

Conclusion

For the foregoing reasons, we affirm the district court's award of attorney's fees.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff,

v.

LARRY DEPEE, et al.,

Defendants. /

No. C 05-1143 SI

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES; ORDER RE: PLAINTIFF'S BILL OF COSTS

Plaintiff has filed a motion for attorneys' fees, and the parties have each filed a bill of costs and objections to the other side's cost bill. For the reasons set forth below, the Court GRANTS in part plaintiff's motion and awards $136,687.35 in fees, directs the Clerk to tax costs in favor of plaintiff, DENIES defendant's bill of costs, and directs plaintiff to file a renewed motion for non-taxable costs after the Clerk taxes costs.

DISCUSSION

Plaintiff sued defendants after California Highway Patrol Officer Larry Depee shot and killed her son John Watkins in the course of a late-night encounter in Crescent City, California. The three

week jury trial was bifurcated. On liability, the jury returned a mixed verdict: the jury found that defendant Depee violated John's Fourth Amendment rights (42 U.S.C. § 1983) and caused a battery to John (state law wrongful death claim), but found against plaintiff on her own Fourteenth Amendment claim. In the damages phase, the jury awarded nominal damages of $1 on the § 1983 Fourth Amendment claim and $1 on the battery claim. The jury did not award punitive damages. On August 15, 2007, the Court entered judgment in favor of plaintiff and against defendants. Now before the Court are plaintiff's motion for attorneys' fees and costs, and both parties' Rule 54(d) bill of costs.

I. Plaintiff's motion for attorneys' fees

A. Entitlement to fees

Plaintiff seeks a total of $686,796.74 in attorney's fees and $117,654.68 in costs (less the costs covered by plaintiff's bill of costs, discussed *infra*). The parties dispute both plaintiff's entitlement to fees, and the reasonableness of the amounts sought. With regard to entitlement, defendants contend that because plaintiff recovered only nominal damages, and prevailed on only two of the three claims at trial (and two of the original sixteen alleged), plaintiff should not recover any fees. Plaintiff responds that she is entitled to fees because of the significance of the legal issue upon which she prevailed, the public purpose served by this litigation, and the deterrent effect of this case.

The parties agree that in a nominal damages case, the Court has discretion to award attorneys' fees if the plaintiff can show "some way in which the litigation succeeded, in addition to obtaining a judgment for nominal damages." *Benton v. Oregon Student Assistance Comm'n,* 421 F.3d 901, 905 (9th Cir. 2005) (*quoting Wilcox v. City of Reno,* 42 F.3d 550, 553 (9th Cir. 1994)). "If the lawsuit achieved other tangible results – such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects – such results will, in combination with an enforceable judgment for a nominal sum, support an award of fees.'" *Wilcox,* 42 F.3d at 555. Other factors supporting a fee award include "'the significance of the legal issue on which the plaintiff claims to have prevailed' and whether the success 'accomplished some public goal. . . .'" *Benton,* 421 F.3d at 905-06 (*quoting Farrar v. Hobby,* 506 U.S. 103, 121 (1992)).

Here, the Court finds that several factors weigh in favor of an award of fees, although not in the amount sought by plaintiff. The Court agrees with plaintiff that by its very nature, a wrongful death case involves significant legal issues, serves a public purpose, and affirms important rights, regardless of the amount of damages recovered. The Court finds unavailing defendants' reliance on *Benton* and *Romberg v. Nichols,* 48 F.3d 453 (9th Cir. 1994). In *Benton,* the plaintiff was a college professor who held a degree from Bob Jones University, an unaccredited university emphasizing conservative values. The plaintiff

brought a § 1983 action against numerous defendants after the Oregon Office of Degree Authorization decreed that she should be fired from her position at the college because her degree was "illegal." The plaintiff alleged claims for violation of her federal and state constitutional rights to free speech, free exercise of religion, due process and equal protection. After a bench trial, the district court found that one defendant, Contreras, had violated the plaintiff's constitutional rights, awarded the plaintiff nominal damages, and awarded attorneys' fees and costs. The Ninth Circuit reversed the fee award, noting that prior to the district court's finding of a constitutional violation, there were legislative and administrative changes that addressed the violations at issue, and thus "the record in this case does not support the district court's conclusion that its finding of a constitutional violation under the former version of the statute will in any way guide defendant Contreras' future conduct." 421 F.3d 907-08. The Ninth Circuit also found that the fee award was not supported because there were no tangible results aside from the nominal damages award. *Id.* at 908.

In *Romberg*, the plaintiffs were tenants who alleged that their Fourth Amendment rights had been violated by a warrantless search of their apartment. The Ninth Circuit reversed the district court's fee award, noting that although the plaintiffs had requested $2 million in damages, they were only awarded nominal damages. The court further noted that the plaintiffs had not identified any non-monetary

successes resulting from their litigation. 48 F.3d at 455.

Without in any way diminishing the importance of the constitutional rights vindicated in *Benton* and *Romberg,* the Court agrees with plaintiff that the constitutional rights at stake in a wrongful death case are of a different magnitude than those at issue in non-death cases, and that cases such as the instant one present questions of vital importance to the public. The Court also finds that, in addition to obtaining nominal damages, plaintiff achieved other "tangible results" in that the jury's verdict will likely deter defendant Depee from engaging in future unconstitutional conduct. *See Benton,* 421 F.3d at 907-08. Because of the significance of the legal issues and the deterrent effect of this case, the Court rejects defendants' contention that fees should be denied due to the discrepancy between the damages sought and the damages awarded. As discussed below, however, the Court finds that the fees should be significantly reduced in light of plaintiff's limited success.

B. Amount of fees

Plaintiff seeks an award of $686,796.74 in attorneys fees and $117,654.68 in costs. Defendants raise a number of objections to the amount of fees sought. In general, the Court finds that plaintiff's attorneys have submitted adequate billing records and that they have supported the hourly rates sought. However, the Court agrees with defendants

that the following deductions should be made from the lodestar: (1) an erroneous entry of $2,100 for Mr. Pankopf for travel to and attendance at the court hearing on defendants' motion to dismiss/strike held on July 8, 2005[1]; and (2) time spent on media contacts ($1,160), *see Gates v. Gomez,* 60 F.3d 525, 535 (9th Cir. 1995). The Court rejects defendants' general assertion that plaintiff's counsel should not be compensated for "duplicative" work, such as when both counsel attended hearings or depositions. It is reasonable for both attorneys to attend important proceedings, particularly in a complicated and risky civil rights case such as this. Moreover, the Court notes that defendants were represented by multiple lawyers from the Attorney General's Office.

Defendants also contend that the Court should drastically reduce the fee request on the ground that many of plaintiff's claims were ultimately unsuccessful. "[T]he extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees" under § 1988." *Hensley v. Eckerhart,* 461 U.S. 424, 440 (1983). Courts may, in their discretion, reduce a fee award to reflect limited success, such as when a plaintiff only prevails on some claims, or only against one of several defendants. *See Lytle v. Carl,* 382 F.3d 978, 989 (9th Cir. 2004) (district court did not abuse discretion by reducing fees when plaintiff did not prevail on majority

---

[1] Plaintiff concedes that this entry was erroneous.

of original claims); *see also Webb v. Sloan,* 330 F.3d 1158, 1169-70 (9th Cir. 2003) (discretionary reduction was appropriate where plaintiff only prevailed against one of several defendants).

The Court finds it appropriate to reduce plaintiff's lodestar by 80% ($546,749.39) to account for plaintiff's limited success, for a total of $136,687.35 in fees. The original complaint was brought on behalf of Sylvia Mahach-Watkins, individually and on behalf of the Estate of John Watkins, and Patricia Ann Watkins. After defendants removed this case and filed a motion to dismiss, plaintiff amended the complaint and dropped Ms. Watkins as a plaintiff in response to defendants' argument that she had no standing, and dropped the State of California as a defendant in several claims in response to defendants' argument that the State could not be sued under 42 U.S.C. §§ 1983, 1985 and 1986. Defendants then successfully moved to dismiss a number of claims alleged in the amended complaint. Following discovery, the Court granted a substantial portion of defendants' motion for summary judgment. Finally, at trial, plaintiff prevailed on two of the three remaining claims, and the jury awarded nominal damages. Under these circumstances, the Court finds it appropriate to significantly reduce the fees sought. "[T]he relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley,* 461 U.S. at 440; *see also Harris v. Marhoefer,* 24 F.3d 16, 18-19 (9th Cir. 1994) (affirming district court's 50% reduction of

attorneys' fees in civil rights case based on plaintiff's partial success).

II. Costs

Plaintiff seeks $117,654.68 in taxable and non-taxable costs pursuant to § 1988 and Federal Rule of Civil Procedure 54(d).

A. Taxable costs

Plaintiff and defendant Depee have each submitted a bill of costs pursuant to Federal Rule of Civil Procedure 54(d), and each side has filed objections to the other's cost bill. Plaintiff contends that she is the prevailing party, and that defendant Depee is not entitled to recover any costs. Defendants assert that because plaintiff only prevailed on two of the three claims at trial, she could only recover 66.66% of her costs, and that defendant Depee should recover 33.33% of his costs.

Rule 54(d) provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d). The Court has discretion to award costs. *See Miles v. State of California,* 320 F.3d 986, 988 (9th Cir. 2003). Here, for the reasons stated *supra,* the Court finds that plaintiff prevailed in this action, and she is entitled to recover her taxable costs. The Court finds that defendant Depee is not a prevailing party, and thus he is not entitled to recover

any costs. The Clerk shall tax allowable costs in favor of plaintiff.

B. Additional costs under § 1988

Plaintiff has included the taxable costs in its motion for attorneys' fees and costs under § 1988, and requests that the Court deduct the costs taxed by the Clerk from its § 1988 award. Plaintiff has not identified which costs would be deducted, and it is not the Court's job to comb through plaintiff's voluminous filings and compare the two costs submissions. The Court finds that most efficient course is as follows: after the Clerk has taxed costs, plaintiffs may file a renewed motion for costs under § 1988, with a supporting declaration. That renewed motion shall only seek to recover non-taxable costs, and shall not seek to recover expert fees, *see Jenkins by Jenkins v. State of Missouri,* 158 F.3d 980, 983 (8th Cir. 1998), or costs for general office supplies. Within 7 days of plaintiff's renewed cost motion, defendant may file an objection to any specific costs sought therein. The Court will then take the matter under submission.

CONCLUSION

The Court GRANTS in part plaintiff's motion for attorneys' fees, and awards $136,687.35 in fees. (Docket No. 218). The Court directs the Clerk to review plaintiff's bill of costs and tax costs in favor of plaintiff. (Docket Nos. 207 & 208). The Court finds that defendant Depee is not a prevailing party, and

DENIES defendant's bill of costs. (Docket Nos. 206 & 209).

IT IS SO ORDERED.

Dated: February 25, 2008 /s/ Susan Illston
SUSAN ILLSTON
United States District Judge

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYLVIA MAHACH-WATKINS, Individually & as the Successor in Interest to the Estate of John Joseph Wayne Watkins; PATRICIA ANN WATKINS, Plaintiffs-Appellees, v. LARRY DEPEE, a California Highway Patrol Officer; STATE OF CALIFORNIA, Defendants-Appellants.	No. 08-15694 D.C. No. 3:05-cv-01143-SI **ORDER** (Filed Apr. 28, 2010)

Before: D.W. NELSON, W. FLETCHER and PAEZ, Circuit Judges.

The panel has voted to deny the petitions for rehearing. Judges Fletcher and Paez have voted to deny the petitions for rehearing en banc and Judge Nelson so recommends.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellee Mahach-Watkins' petition for rehearing and petition for rehearing en banc, filed February 16, 2010, are DENIED.

Appellant Depee's petition for rehearing and petition for rehearing en banc, filed February 16, 2010, are DENIED.

Supreme Court, U.S.
FILED

(1)

167

No. 10- 10-155

JUL 28 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

CITY OF LONG BEACH,

Petitioner,

v.

LONG BEACH AREA
CHAMBER OF COMMERCE, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *Citizens United v. FEC*, 130 S. Ct. 876 (2010), which overturned a federal law imposing an absolute ban on corporate independent expenditures in federal elections, compel the conclusion that a municipal ordinance limiting contributions to independent expenditure committees in a non-partisan municipal election is unconstitutional?

2. Is combating the appearance of corruption an important interest which a municipal government may address by limiting contributions to independent expenditure committees which participate in non-partisan municipal elections?

3. Should findings in a municipal ordinance, expressing the will of its citizens, constitute sufficient evidence that unlimited contributions to independent expenditure committees create the appearance of corruption in municipal politics?

PARTIES TO THE PROCEEDING

Petitioner (defendant, appellant, and appellee below):

CITY OF LONG BEACH

Respondents (plaintiffs, appellants and appellees below):

LONG BEACH AREA CHAMBER OF COMMERCE, a non-profit California mutual benefit corporation, on behalf of itself, and its members; LONG BEACH AREA CHAMBER OF COMMERCE PAC; LONG BEACH AREA CHAMBER OF COMMERCE – MAYORAL PAC; AND LONG BEACH AREA CHAMBER OF COMMERCE – CITY COUNCIL PAC

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The City of Long Beach is a municipal corporation organized under the laws of the State of California.

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Petitioner City of Long Beach respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 603 F.3d 684 (9th Cir. 2010). (App. 2) The United States District Court for the Central District of California's Order on Plaintiffs' and Defendant's Motions for Summary Judgment is not reported. (App. 33) The United States District Court for the Central District of California's Order on Plaintiff's Motion for Clarification is not reported. (App. 57)

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment on April 30, 2010. There was no petition for rehearing. This petition for writ of certiorari is timely filed within 90 days of entry of judgment pursuant to 28 U.S.C. § 2101(c) and Rule 13(1) of the Rules of the Supreme Court. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATE AND MUNICIPAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the Government for redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Long Beach Campaign Reform Act (the "Act"), codified as Chapter 2.01 of the Long Beach Municipal Code (the "LBMC"), was adopted by the citizens of Long Beach, as Proposition M, June 7, 1994, effective June 24, 1994. The Act provides in pertinent part:

Section 2.01.120 – Findings and declarations.

In enacting this Chapter 2.01, the following findings and declarations are adopted:

A. Monetary contributions to political campaigns are a legitimate form of participation in the political process, but the financial strength of certain individuals or organizations should not permit the exercise of a disproportionate or controlling influence on the election of candidates.

B. The rapidly increasing costs of political campaigns have forced many candidates to raise larger and larger amounts of money from individuals and interest groups with a specific financial stake in matters before the city council. This has caused a public perception that votes are being improperly influenced by monetary contributions. This perception is undermining the credibility and integrity of the governmental process.

C. Candidates are raising less money in small contributions and more money in large individual and organizational contributions. This has created the public impression that the small contributor has an insignificant role to play in political campaigns.

D. High campaign costs are forcing officeholders to spend more time on fund-raising and less time on the public's business. The constant pressure to raise contributions is distracting officeholders from urgent governmental matters.

E. Officeholders are responding to high campaign costs by raising large amounts of money in off-election years. This fund-raising distracts them from important public matters, encourages contributions which may have a corrupting influence and gives incumbents an overwhelming and patently unfair fund-raising advantage over potential challengers.

F. The integrity of the governmental process, the competitiveness of campaigns and public confidence in local officials are all diminishing.

Section 2.01.130 – Purpose.

It is the purpose of this Chapter 2.01:

A. To insure that individuals and interest groups in Long Beach have a fair and equal opportunity to participate in municipal elective and governmental processes.

B. To reduce the influence of large contributors with a specific financial stake in matters before the city council, thus countering the perception that decisions are influenced more by the size of

contributions than the best interests of the people of the city.

C. To assist serious candidates in raising enough money to communicate their views and positions adequately to the public without excessive expenditures or contributions, thereby promoting public discussion of the important issues involved in political campaigns.

D. To limit overall expenditures in campaigns, thereby reducing the pressure on candidates to raise large campaign war chests for defensive purposes, beyond the amount necessary to communicate reasonably with voters.

E. To provide a neutral source of campaign financing in the form of limited public matching funds.

F. To increase the value to candidates of smaller contributions.

G. To eliminate fund-raising except during an election cycle.

H. To reduce the excessive fund-raising advantage of incumbents and thus encourage competition for elective office.

I. To allow candidates and officeholders to spend a lesser proportion of their time on fund-raising and a greater proportion of their time dealing with issues of importance to their constituents.

J. To improve the disclosure of contribution sources in reasonable and effective ways.

K. To help restore public trust in local governmental and electoral institutions.

Section 2.01.210 – Definitions.

For purpose of this Chapter 2.01, the following words and phrases shall have the meanings set forth as follows unless the contrary is stated or clearly appears from the content: . . .

D. "Person" means any individual, organization or political action committee whose contributions or expenditure activities are financed, maintained or controlled by any corporation, labor organization, association, political party or any other person or committee, including any parent, subsidiary, branch, division, department or local unit of the corporation, labor organization, association, political party or any other person, or by any group of such persons.

Section 2.01.220 – Interpretation.

Unless a term is specifically defined in this Chapter 2.01 or the contrary is stated or clearly appears from the context, the definitions set forth in California Government Code, Section 82000 et seq., shall govern the interpretation of this Chapter 2.01.

Section 2.01.310 – Limitations on contributions from persons.

A. For primary and general elections, no person shall make to any candidate for office or the controlled committee of such a candidate, and no such candidate or the candidate's controlled committee shall accept from any such person, a contribution or contributions totaling more than two hundred fifty dollars ($250.00) for the primary election and two hundred fifty dollars ($250.00) for the runoff election if the candidate is on the runoff ballot or is a write-in candidate for the office of city council member, three hundred fifty dollars ($350.00) for the primary election and three hundred fifty dollars ($350.00) for the runoff election if the candidate is on the runoff ballot or is a write-in candidate for city attorney, city auditor or city prosecutor or five hundred dollars ($500.00) for the primary election and five hundred dollars ($500.00) for the runoff election if the candidate is on the runoff ballot or is a write-in candidate for mayor.

B. For primary and general elections, no person shall make to any committee which supports or opposes any candidate and no such committee shall accept from each such person a contribution or contributions totaling more than two hundred fifty dollars ($250.00) for the primary election and two hundred fifty

dollars ($250.00) for the runoff election for city council members, three hundred fifty dollars ($350.00) for the primary election and three hundred fifty dollars ($350.00) for the runoff election for city attorney, city auditor or city prosecutor, or five hundred dollars ($500.00) for the primary election and five hundred dollars ($500.00) for the runoff election for mayor.

C. For special elections, no person shall make to any candidate for office or the controlled committee of such a candidate, and no such candidate or the candidate's controlled committee shall accept from any such person, a contribution or contributions totaling more than one thousand dollars ($1,000.00); and no political committee (as defined in California Government Code Section 82013) shall make to any candidate for office or the controlled committee of such a candidate, and no such candidate or the candidate's controlled committee shall accept from any such political committee, a contribution or contributions totaling more than two thousand five hundred dollars ($2,500.00).

Section 2.01.610 – Contribution limitations.

Any person who makes independent expenditures supporting or opposing a candidate shall not accept any contribution in excess of the amounts set forth in Section 2.01.310.

Section 2.01.1210 – Inflation/deflation.

A. Any amount subject to a limitation or ceiling, or established pursuant to formula set forth in Section 2.01.310 or Subsections 2.01.410.A.1 and 2.01.410.A.4 of this act shall be automatically adjusted on January 1, 1996, and on January 1 of each even numbered year thereafter, upward or downward, equivalent to the most recent change in the annual average of the consumer price index as published by the United States Department of Labor for the Los Angeles – Long Beach – Anaheim Metropolitan area.

B. For purposes of calculating the annual inflator/deflator factor under this section, the base year shall be that year ending with the quarter ending June 30, 1995. Rates shall first be adjusted on January 1, 1996, and every two (2) years thereafter, based on the annually calculated change from the base year.

California Government Code § 82031 provides:

"Independent expenditure" means an expenditure made by any person, including a payment of public moneys by a state or local governmental agency, in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously

urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.

STATEMENT OF THE CASE

In 1994, the voters of the City of Long Beach (the "City"), adopted, by initiative, the Long Beach Campaign Reform Act. The Act is based on the voters' findings, in part, that:

> 1. Monetary contributions to political campaigns are a legitimate form of participation in the political process, but the financial strength of certain individuals or organizations should not permit the exercise of a disproportionate or controlling influence on the election of candidates; and
>
> 2. Candidates are raising less money in small contributions and more money in large individual and organizational contributions. This has created the public impression that the small contributor has an insignificant role to play in political campaigns; and
>
> 3. The rapidly increasing costs of political campaigns have forced many candidates to raise larger and larger amounts of money from individuals and interest groups with a specific financial stake in matters before the city council. This has caused a public perception that votes are being improperly influenced by monetary contributions. This

> perception is undermining the credibility and integrity of the governmental process; and
>
> 4. The integrity of the governmental process, the competitiveness of campaigns and public confidence in local officials are all diminishing (Long Beach Municipal Code § 2.01.120A. B. C. & F.)

One of the Act's purposes, as declared by the voters, is to reduce the influence of large contributors with a specific financial stake in matters before the Long Beach City Council, thus countering the perception that decisions are influenced more by the size of contributions than the best interests of the people of the City. (LBMC § 2.01.130)

The Act takes a measured approach to achieving its goals, especially with regard to "independent expenditures." These are expenditures made to advocate for the election or defeat of a candidate or the qualification, passage or defeat of a measure, or to urge a particular result in an election but which are not made to or at the behest of the affected candidate or committee. (Cal. Gov't Code, § 82031) The Act imposes no limit on independent expenditures. It does limit large aggregations of money for independent expenditures by proscribing independent expenditures by any person or entity (including a political action committee) that accepts contributions from others in excess of specified amounts. (LBMC § 2.01.610) Those limits vary according to the subject of the municipal election campaign (LBMC § 2.01.310) and are adjusted for inflation or deflation (LBMC

§ 2.01.1210 [currently $350 to $650 for regular elections]).

The Long Beach Area Chamber of Commerce (the "Chamber") has approximately 1,400 members, 90% of which are small businesses. Member businesses pay dues structured according to the number of employees. Dues for businesses with between 10 and 100 employees are $560 to $1,330. The Chamber has three affiliated political action committees (collectively, the "Chamber PACs"): the Long Beach Area Chamber of Commerce PAC; the Long Beach Area Chamber of Commerce – Mayoral PAC; and the Long Beach Area Chamber of Commerce – City Council PAC. The Chamber PACs receive contributions from Chamber members (through a dues check-off) and from other, non-Chamber individuals and businesses.

The Chamber and the Chamber PACs sued the City in United States District Court for the Central District of California under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202 to enjoin the Act's enforcement, contending the Act violates their First Amendment rights of speech and association. The District Court had federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3).

The parties filed cross-motions for summary judgment based on a stipulation of facts. In its April 1, 2007 order on the summary judgment motions, the District Court applied a strict scrutiny analysis, found the Act is not narrowly tailored to serve an overriding state interest, and therefore ruled the Act

unconstitutional as applied to the Chamber and others similarly situated. The Court's theory was that the Act restricted the Chamber's expenditures by barring the Chamber from making any independent campaign expenditures whatsoever because the source of the Chamber's money was membership dues, some of which dues exceeded the Act's contribution limits. This would require the Chamber to alter its fundamental membership dues structure in order to exercise its First Amendment rights.

The District Court entered judgment on May 1, 2007. The District Court (1) declared the Act unenforceable as applied to the Chamber and others similarly situated insofar as it limits contributions for use as independent campaign expenditures (LBMC § 2.01.610) and prohibits the Chamber and others similarly situated from making independent expenditures if they receive contributions in excess of the specified amounts (LBMC § 2.01.310 (B) and (C)), and (2) permanently enjoined the City from enforcing those provisions.

The Chamber and the Chamber PACs moved for clarification of the judgment as to whether the Court intended to include the Chamber PACs among those similarly situated with the Chamber. In response, the Court ruled that Chamber PACs were not similarly situated. Unlike the Chamber, the Chamber PACs have no membership dues. "If the Chamber PACs wish to expend funds on campaign expenditures, they can do so as long as they follow the requirements of the Long Beach ordinance." (App. 63)

On the merits, the District Court applied a lower standard of scrutiny to the Act for the Chamber PACs than it did for the Chamber: "[B]ecause the ordinance does not place a 'severe burden on fully protected speech and association freedoms' . . . the Court will apply 'a lower level of constitutional scrutiny' than strict scrutiny." (App. 63) "The Supreme Court has stated that a 'constitutionally sufficient justification' is limiting the actuality and appearance of corruption resulting from large individual financial contributions" (citing *Buckley v. Valeo*, 424 U.S. 1, 26 (1976)). The District Court found such a justification as to the Chamber PACs:

> The parties have stipulated that "[t]he second codified purpose of the [ordinance] is to 'reduce the influence of large contributors with a specific financial stake in matters before the City Council, thus countering the perception that decisions are influenced more by the size of contributions than the best interests of the people of the City.'" (App. 64)

Accordingly, on July 12, 2007, the District Court ruled "that the relevant Long Beach ordinance, as applied to the PACs and others similarly situated, is constitutional." (App. 64)

The City, the Chamber and the Chamber PACs all appealed.[1] The appeals were briefed and argued

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[1] The appeals included issues whether the City's appeal from the May 1, 2007 judgment prohibited the District Court

(Continued on following page)

prior to this Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876, (2010). The Ninth Circuit sought supplemental briefing regarding *Citizens United*'s effect on this case.

The Ninth Circuit, in an opinion authored by Judge Wardlaw and joined by Chief Judge Kozinski and Judge D. Nelson, vacated the District Court's grant of judgment in favor of the Chamber with instructions to dismiss the Chamber's claim for want of jurisdiction, and reversed the District Court's grant of summary judgment in favor of the City and against the Chamber PACs. (App. 32)

As to the jurisdictional issue, the Ninth Circuit held that the Chamber lacked standing to challenge the Act because its bylaws do not authorize it to make contributions or independent expenditures. That the Chamber might change its bylaws in the future is insufficient to create an Article III case or controversy. The Chamber PACs, however, have standing because they do make independent expenditures and accept contributions that are likely in excess of the Act's limitations.

On the merits of the Chamber PACs' First Amendment claim, the Ninth Circuit applied the following analysis. The Ninth Circuit noted the

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from subsequently clarifying its judgment and whether the Chamber PACs' appeal was timely. The Ninth Circuit resolved those issues in the Chamber PACs' favor The City does not challenge those rulings here.

different levels of scrutiny this Court has applied to limitations on campaign contributions on the one hand (limits must be closely drawn to match a sufficiently important interest) and independent campaign expenditures on the other (narrow tailoring to meet a compelling governmental interest).[2] It was unclear to the Ninth Circuit which standard applied here, because the Act's hybrid form of regulation of contributions to entities which make independent expenditures is not subject to easy classification as either a contribution limitation or an expenditure limitation. The Ninth Circuit declined to resolve that perceived issue, however, because, in its view, the City had not shown that any proffered governmental interest is sufficiently important to support the Act's application to the Chamber PACs under either level of scrutiny.

Next, the Ninth Circuit analyzed the proffered governmental interests:

First, the Ninth Circuit rejected the rationale that limitations were necessary to provide the City's residents and interest groups fair and equal opportunity to participate in municipal elective and governmental processes. The Ninth Circuit read the *Citizens United* decision as rejecting the "anti-distortion rationale" because it would permit

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[2] The Ninth Circuit declined to "read the tea leaves" whether the distinctions in levels of scrutiny will survive after *Citizens United*.

government to decide which voices could be heard in an election campaign.

Second, the Ninth Circuit rejected the rationale that a limit on overall campaign expenditures would allow candidates and officeholders to spend less time fund-raising and more time dealing with issues of importance to voters. Fund-raising takes precedence in this regard because the government cannot be allowed to determine that spending to promote one's political views is wasteful or unwise.

Finally, the Ninth Circuit rejected the Act's "anti-corruption" rationale. While acknowledging that this Court has upheld limitations on contributions to entities whose relationships with candidates are sufficiently close to justify concerns about corruption or the appearance of corruption, the Ninth Circuit found that "the City offers no basis on which to conclude that the Chamber PACs have the sort of close relationship with candidates that supports a plausible threat of corruption or the appearance thereof." (App. 31)

REASONS TO GRANT THE PETITION

The elimination of corruptive influences in local politics fosters public confidence in government. Democracies cannot survive without the general confidence of the electorate that elected leaders are accountable primarily to the general electorate, and are not unduly influenced by favors owed to large

donors or corporate interests. Local initiatives, directly adopted by voters at the municipal ballot box, designed to eliminate corruptive influences and the appearance of corruption, are profoundly important to maintaining the integrity of local democratic governments and maintaining widespread participation by members of the community in the local democratic process.

I. *Citizens United v. FEC*, 130 S. Ct. 876, (2010), which overturned a federal law imposing an absolute ban on corporate independent expenditures in federal elections, does *not* compel the conclusion that a municipal ordinance limiting contributions to independent expenditure committees in a non-partisan municipal election is unconstitutional.

In *Citizens United*, this Court recently struck down 2 U.S.C. § 441(b) ("Section 441(b)"), which provided for an absolute ban on corporate independent expenditures proposed to be made by a non-profit corporation through its nationwide distribution of a film opposing a presidential candidate. The Ninth Circuit, relying primarily on *Citizens United*, held that "Supreme Court precedent forecloses the City's argument that independent expenditures by independent expenditure committees, like the Chamber PACs, raise the specter of corruption or the appearance thereof." (App. 22) The Ninth Circuit erred in relying on this Court's holding in *Citizens United* to rule that this Court's precedent prohibited the

Ninth Circuit from upholding the City's contribution regulations. This case differs from *Citizens United* in five significant respects.

First, Section 441(b) prohibited *expenditures* made by corporations and corporate independent expenditure committees ("IECs"), while the Act prohibits *contributions* to IECs. As discussed in more detail below, there is valid precedent supporting limitations on contributions to IECs, as opposed to expenditures by IECs. Second, Section 441(b) *banned* expenditures, while the Act merely *limits* contributions, placing a significantly lesser burden on speech than Section 441(b). Third, Section 441(b) was a *federal* statute, while the Act is a *municipal* ordinance. This Court's holding that expenditures by IECs at the federal level cannot reasonably give rise to the appearance of corruption does not necessarily mean that expenditures by IECs at the local level cannot give rise to the appearance of corruption. Fourth, Section 441(b) banned *corporations* from making expenditures without prohibiting private individuals and other entities from making expenditures, thus discriminating against a certain class of speaker, namely, corporations. The Act applies its contribution limitations *equally* to all classes of speakers. Lastly, *Citizens United* considers Section 441(b)'s application to a bitterly *partisan* contest for president between national political parties, while the subject case concerns the Act's application to non-partisan IECs and *non-partisan* elected positions and ballot measures. Expenditures made by one party's partisans

against the opposing party's candidates may not give rise to the appearance of corruption because the very nature of party membership tends to draw like-minded individuals together who share the same values and worldviews. In the absence of any obvious partisan motive for an IEC to support a particular candidate or ballot measure, it is much more likely that large, unregulated contributions to an IEC that supports local non-partisan candidates may reasonably give rise to the appearance of corruption on the part of the local electorate.

II. Combating the appearance of corruption *is* an important interest which a municipal government may address by limiting contributions to independent expenditure committees which participate in non-partisan municipal elections.

This Court has long recognized a governmental interest in combating government corruption and the appearance thereof, and has held that such interest is sufficient to justify certain limitations on speech. In *McConnell v. FEC,* 540 U.S. 93 (2003), this Court upheld limitations on contributions to national political parties, stating that all large soft-money contributions to national political parties were suspect due to the relationship between the political parties and federal officeholders. *Id.* at 154-155. In *California Medical Association v. FEC,* 453 U.S. 182 (1981), this Court upheld limitations on contributions to multi-candidate political committees because they posed a

perceived threat of actual or potential corruption. *Id.* at 203. The Ninth Circuit should have found that the nature of the relationship between local IECs and candidates in local elections is closely akin to the nature of the relationship between national political parties and federal officeholders.

From the viewpoint of the municipal voter, IECs which make expenditures explicitly supporting or opposing certain candidates effectively play the same role as political parties on the national level, largely because the non-partisan nature of local elections greatly limits the local influence of political parties. While neither national political parties nor local IECs are directly controlled by candidates, both can reasonably be perceived to pose a threat of actual or potential corruption. It is reasonable for the public to suspect an implicit quid pro quo between the local candidate and IECs. In order to counteract the possibility of such corruption and undue influence, the local government, acting on the direction of the electorate through the initiative process, should have the right to reasonably limit contributions to IECs.

The Ninth Circuit erred in its overbroad application of both *Citizens United* and *Emily's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009). In *Emily's List*, the D.C. Circuit considered the case of *Emily's List*, a non-profit organization which received contributions and made independent expenditures nationwide in order to promote abortion rights. The D.C. Circuit struck down contribution limits as applied to *Emily's List* because it found there was no likelihood of

corruption between *Emily's List* and the candidates which it supported. The D.C. Circuit held that "non-profit groups do not have the same inherent relationship with federal candidates and officeholders that political parties do." *Id.* at 14. The Ninth Circuit, citing *Emily's List*, incorrectly reasoned that the local PACs "relationship with local candidates is, at best, attenuated." (App. 27) The D.C. Circuit's holding in *Emily's List* applied specifically to the relationship between *nationwide non-profit groups and federal candidates and officeholders*. The intimate nature of the relationship between the local PACs and candidates for local office in non-partisan elections is fundamentally different from the nature of the relationship between national groups and federal candidates. The fundamental difference is the increased influence that IECs can have upon minimally-funded local candidates, particularly given the personal and private interviews that the IECs board members conduct with each candidate before determining which candidate to support. (App. 27)

The *Citizens United* Court did not consider the constitutionality of limits on contributions to (as opposed to expenditures by) IECs at the local level. Nevertheless, the Ninth Circuit, quoting *Citizens United*, held that "independent expenditures . . . do not give rise to corruption or the appearance of corruption." (App. 23) Assuming that the Act limited independent expenditures, as opposed to contributions (which on its face it clearly does not), the holding of *Citizens United* should be limited to its

facts. The relationship between Citizens United, a nationally-funded group that produced and distributed a film highly critical of a presidential candidate, on the one hand, and that presidential candidate's opponents, on the other hand, was attenuated. The relationship between IECs in local elections and local candidates for office is significantly more intimate than the relationship considered in *Citizens United*, and significantly more likely to lead to implicit quid pro quo corruption.

Neither the *Citizens United* ruling nor the *Emily's List* ruling stands for the broad proposition that preventing the appearance of corruption cannot constitute a compelling government interest. Accordingly the Ninth Circuit erred in relying on *Citizens United* to find that this Court's precedent prevented it from finding that contributions to IECs could raise the specter of corruption or the appearance of corruption.

III. Findings in a municipal ordinance, expressing the will of its citizens, constitute sufficient evidence that unlimited contributions to independent expenditure committees create the appearance of corruption in municipal politics.

The Ninth Circuit further erred in finding that the City's anti-corruption rationale was lacking in factual support because "the City has not offered sufficient evidence of corruption to support its asserted governmental interest in restricting contributions to

IECs." (App. 22) For the reasons stated above, the Ninth Circuit should have considered evidence of the *appearance of corruption*, rather than requiring evidence of actual corruption. The Ninth Circuit found that the City failed to offer a single fact or event which supports the City's contention that unrestricted financial contributions to IECs have a corruptive influence. (App. 28)

The Ninth Circuit suggested in a footnote that the matter before it may have been decided differently "if there were evidence that [the interviews between the IEC board members and candidates] ended with a 'wink and a nod' between the candidate and the [board members]," but it is unreasonable to require the City to provide evidence of such corruption when by their very nature such corrupt arrangements are completed informally and behind closed doors. Moreover, it is nearly impossible to prove with empirical evidence what the perception of the average voter is with respect to contributions to IECs. Perceptions are by their nature very personal things. Perhaps a poll of all registered voters regarding their perceptions of unrestricted financial contributions to IECs, which then make independent expenditures in support of or in opposition to candidates or ballot measures, might have provided evidence of the average voter's perception. In the present case, the finding of the majority of voters in adopting the Act, which found that contribution limitations would combat "the public perception that votes are being improperly influenced by monetary contributions,"

constitutes, in essence, the poll of the average voter. The Ninth Circuit erred in not relying upon the findings in the Act to show that the average City voter did indeed perceive corruption in unlimited contributions to IECs.

CONCLUSION

In essence, the Act adopted by the citizens of Long Beach concluded that contributions to IECs may not exceed the contribution limits applicable to the candidate on whose behalf an independent expenditure would be made. The Act contains a finding that contributions in excess of that amount create the perception that decisions are influenced more by the size of contributions than the best interests of the people of Long Beach. The contribution limits are logically connected to the candidate contribution limit, and impliedly acknowledge a fact of life in local politics – that an "independent" expenditure is often not truly independent. Unless contributions to IECs are controlled, contribution limits applicable to candidates are effectively undermined. The Ninth Circuit's analysis of the holding in *Citizens United* nullifies the will of not only the voters of Long Beach, but the voters in thousands of municipalities nationwide which have adopted campaign finance ordinances similar to the Act. This case provides this Court with an opportunity to clarify and narrow the application of *Citizens United* and other recent decisions. Reversing the Ninth Circuit's ruling in the

subject case would both protect the government's significant interest in combating the appearance of corruption, and bolster citizen confidence in the workings of local government.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LONG BEACH AREA CHAMBER OF COMMERCE, a non-profit California mutual benefit corporation, on behalf of itself and its members; LONG BEACH AREA CHAMBER OF COMMERCE PAC; LONG BEACH AREA CHAMBER OF COMMERCE – MAYORAL PAC; LONG BEACH AREA CHAMBER OF COMMERCE – CITY COUNSEL PAC, *Plaintiffs-Appellees,* v. CITY OF LONG BEACH, *Defendant-Appellant.*	No. 07-55691 D.C. No. CV-06-01497-PSG

LONG BEACH AREA CHAMBER OF COMMERCE, a non-profit California mutual benefit corporation, on behalf of itself and its members; LONG BEACH AREA CHAMBER OF COMMERCE PAC; LONG BEACH AREA CHAMBER OF COMMERCE – MAYORAL PAC; LONG BEACH AREA CHAMBER OF COMMERCE – CITY COUNSEL PAC, *Plaintiffs-Appellants,*	No. 07-56081 D.C. No. CV-06-01497-PSG

v.

CITY OF LONG BEACH,
Defendant-Appellee.

LONG BEACH AREA CHAMBER OF COMMERCE, a non-profit California mutual benefit corporation, on behalf of itself and its members; LONG BEACH AREA CHAMBER OF COMMERCE PAC; LONG BEACH AREA CHAMBER OF COMMERCE – MAYORAL PAC; LONG BEACH AREA CHAMBER OF COMMERCE – CITY COUNSEL PAC,

Plaintiffs-Appellees,

v.

CITY OF LONG BEACH,
Defendant-Appellant.

No. 07-56190

D.C. No.
CV-06-01497-PSG

OPINION

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Argued and Submitted
October 28, 2009 – Los Angeles, California

Filed April 30, 2010

Before: Alex Kozinski, Chief Judge,
Dorothy W. Nelson and
Kim McLane Wardlaw, Circuit Judge

Opinion by Judge Wardlaw

COUNSEL

Charles H. Bell, Jr. and Jimmie E. Johnson of Bell, McAndrews, & Hiltachk, LLP, Sacramento, CA; John C. Eastman of Chapman University Law School, Orange, California, for the appellees.

Robert E. Shannon and Monte H. Machit of the City Attorney's Office, Long Beach, California, for the appellant.

Reid Alan Cox and Stephen M. Hoersting of the Center for Competitive Politics, Alexandria, Virginia, for amicus curiae Center for Competitive Politics.

Richard Doyle, George Rios and Lisa Herrick of the Office of the City Attorney, San Jose, California, for amicus curiae League of California Cities.

Appeal from the United States District Court for the Central District of California, Philip S. Gutierrez, District Judge, Presiding. D.C. No. CV-06-01497-PSG.

Before ALEX KOZINSKI, Chief Judge, DOROTHY W. NELSON and KIM McLANE WARDLAW, Circuit Judges.

OPINION

WARDLAW, Circuit Judge:

"[I]t is our law and our tradition that more speech, not less, is the governing rule" under the First Amendment. *Citizens United v. FEC,* 130 S.Ct. 876, 911 (2010). "More speech" often means "more

money." "This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley v. Valeo,* 424 U.S. 1, 19 (1976). Therefore, "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* That political spending is constitutionally protected "speech" has become a "cardinal tenet" of the Supreme Court's campaign finance jurisprudence. *Emily's List v. FEC,* 581 F.3d 1, 5 (D.C. Cir. 2009).

We must decide whether the Long Beach Campaign Reform Act ("LBCRA"), which prohibits "persons" from making any independent expenditures if they receive contributions above certain amounts, is constitutional as applied to the Long Beach Area Chamber of Commerce ("Chamber") and its affiliated political action committees ("Chamber PACs"). Because the Chamber lacks standing, and because the LBCRA does not withstand scrutiny as applied to the Chamber PACs, we vacate in part and reverse in part the district court's judgment that the LBCRA is unconstitutional as applied to the Chamber but constitutional as applied to the Chamber PACs.

BACKGROUND

The City adopted the LBCRA in 1994. It provides that "[a]ny person who makes independent

expenditures supporting or opposing a candidate shall not accept any contribution" in excess of $350 to $650, depending upon the office for which the candidate is running. Long Beach, Cal., Ordinances §§ 2.01.310, 2.01.610. "Person" is broadly defined to include "any individual, organization or political action committee whose contributions or expenditure activities are financed, maintained or controlled by any corporation, labor organization, association, political party or any other person or committee." *Id.* § 2.01.210(D). "Independent expenditures" are "expenditure[s] made by any person . . . in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate . . . but which is not made to or at the behest of the affected candidate or committee." Cal. Gov't Code § 82031; Long Beach, Cal., Ordinances § 2.01.220 (adopting state law definition). An expenditure is not "independent" if it involves the control, direction, cooperation, consultation, coordination, request, or suggestion of a candidate. *See* Cal. Gov't Code § 82015; Cal. Admin. Code tit. 2, § 18225.7; *see also* Long Beach, Cal., Ordinances § 2.01.310 (discussing contribution limitations).

The Chamber is a non-profit mutual benefit corporation consisting of 1,400 dues-paying members, ninety percent of which are small businesses employing fewer than ten employees. Dues for Chamber members with fewer than ten employees range from $350 to $535, and dues for Chamber members with between ten and one-hundred employees range from $560 to $1,330. Some members with greater numbers

of employees pay dues in excess of $10,000. The parties stipulate that the Chamber's dues constitute "contributions" under the LBCRA.[1] Because some of those dues exceed the LBCRA's contribution limitations, the LBCRA prohibits the Chamber from making any independent expenditures.

The Chamber's bylaws, however, do not permit it to make contributions or independent expenditures. Rather, the Chamber participates in City politics through the Chamber PACs – the Long Beach Area Chamber of Commerce PAC, the Long Beach Area Chamber of Commerce Mayoral PAC, and the Long Beach Area Chamber of Commerce City Council PAC – which are separate but affiliated organizations that make independent expenditures in support of select candidates. The Chamber PACs receive contributions from Chamber members who choose to direct a portion of their dues to the Chamber PACs. Non-Chamber members may also contribute to the Chamber PACs.

The Chamber and Chamber PACs ("Plaintiffs") sued to enjoin enforcement of the LBCRA, arguing that its contribution and expenditure limitations violate their rights of speech and association. On April 11, 2007, the district court ruled that the LBCRA is unconstitutional as applied to the Chamber. Relying on our decision in *Lincoln Club of Orange County v.*

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[1] The district court based its decision on the parties' joint stipulation of undisputed facts that accompanied their cross-motions for summary judgment.

City of Irvine, 292 F.3d 934 (9th Cir. 2002), the district court applied strict scrutiny review because the LBCRA imposed a severe burden on the Chamber's freedoms of speech and association. As the district court explained, following enactment of the LBCRA, "[t]he Chamber is forced to alter its dues or organizational structure if it wishes to participate in city-wide elections and also wishes to continue to welcome members with more than 10 employees." That is, absent a drastic overhaul of its membership composition or its dues schedule, the Chamber would be precluded from making any independent expenditures even if its bylaws authorized it to do so.

Plaintiffs and the City each provided the district court with a proposed form of judgment purportedly reciting the district court's ruling. The district court rejected the Chamber's proposed form of judgment, which declared the LBCRA "unconstitutional as applied to *Plaintiffs* and other persons similarly situated" (emphasis added). Instead, it chose the City's proposed form of judgment, declaring the LBCRA "unconstitutional as applied to *Plaintiff* Long Beach Area Chamber of Commerce and other persons similarly situated" (emphasis added). Neither proposed form of judgment expressly addressed the Chamber PACs.

The judgment, entered on May 4, 2007, was timely appealed by the City. It then occurred to the parties that the district court may not have resolved the question of the LBCRA's constitutionality as applied to the Chamber PACs. Naturally, the parties

disagreed on this point. The Plaintiffs argued that the favorable judgment also embraced the Chamber PACs, as the Plaintiffs had recited in their proposed form of judgment, and the City contended otherwise. On July 12, 2007, upon motion by the Plaintiffs, the district court clarified its April 11, 2007, ruling, stating that it had not resolved the constitutionality of the LBCRA as applied to the Chamber PACs in the earlier order. It then "explicitly" concluded that "the Long Beach ordinance is constitutional as applied to the PACs." The district court applied the less demanding "closely drawn" level of scrutiny because it found that the Chamber PACs, which lack the Chamber's membership or dues structures, are less burdened by the LBCRA than is the Chamber. Therefore, the City's interests in preventing corruption or the appearance of corruption in its political process sufficiently justified the LBCRA's contribution limitations and consequent prohibition on spending as applied to the Chamber PACs. The Chamber PACs filed their notice of appeal on July 23, 2007.

JURISDICTION AND STANDARD OF REVIEW

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291. "We review a district court's grant of summary judgment de novo." *Humphries v. County of Los Angeles,* 554 F.3d 1170, 1185 n.10 (9th Cir. 2009). Here, the parties filed cross-motions for summary judgment and stipulated as to the relevant facts. We therefore review the district court's legal

determinations, including constitutional rulings, de novo. *See Bjustrom v. Trust One Mortgage Corp.*, 322 F.3d 1201, 1205 (9th Cir. 2003) ("The parties agree that the facts are not in dispute. We review de novo pure questions of law decided on summary judgment.").

DISCUSSION

I. Jurisdiction

A. Standing

As stated in the parties' stipulation, the City "no longer contends that the Plaintiffs lack standing or that the Plaintiffs' complaint does not present an actual controversy." That litigating posture, however, is insufficient to establish our jurisdiction. The role of the courts is "neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies." *Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir. 2009) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc)). We therefore assess the parties' standing before proceeding to the merits of their dispute. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1035 (9th Cir. 2008).

To establish Article III standing, a plaintiff must show that "it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," that "the injury is fairly traceable to the challenged action of the

defendant," and that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Sacks v. Office of Foreign Assets Control,* 466 F.3d 764, 771 (9th Cir. 2006) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180-81 (2000)). Of course, Plaintiffs need not "await the consummation of threatened injury to obtain preventive relief." *Blum v. Yaretsky,* 457 U.S. 991, 1000, (1982). Instead, where a party seeks prospective relief, "[t]he question becomes whether any perceived threat to[the plaintiff] is sufficiently real and immediate to show an existing controversy." *Id.; see also Lujan,* 504 U.S. at 564 (examining imminence of asserted injury); *City of Los Angeles v. Lyons,* 461 U.S. 95, 105 (1983) (examining likelihood that plaintiff would suffer future injury).

We conclude that the Chamber PACs have Article III standing, while the Chamber itself does not. The Chamber has failed to demonstrate that it has suffered or faces a real and immediate threat of suffering an injury that is fairly traceable to the LBCRA. The Chamber's own bylaws do not authorize it to make contributions or independent expenditures, and the factual record is devoid of any indication that the Chamber either plans to modify those bylaws or even that it desires to do so. The Chamber suggests that it may wish to make contributions or independent expenditures in the future, but this equivocal assertion is hardly sufficient to create a case or controversy. As the Supreme Court has explained, "Such 'some day' intentions – without any description

of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan,* 504 U.S. at 564 (emphasis omitted). Therefore, the district court did not have jurisdiction over the Chamber's action.[2]

Unlike the Chamber, the Chamber PACs do make independent expenditures. Indeed, they were formed for the very purpose of engaging in political activities that support the Chamber's objectives. While the factual record does not detail the precise nature of the contributions that the Chamber PACs receive, it is probable that they are, or will be, offered contributions in excess of the LBCRA's limitations, given the Chamber's dues structure and contribution scheme and the wide range of entities from which the Chamber PACs receive contributions. Because the LBCRA poses a "real and immediate" threat to the Chamber PACs' ability to accept certain contributions

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[2] The Chamber's counsel referred to allegations in the complaint when we expressed concern as to standing during oral argument. While those allegations might be sufficient to overcome a motion to dismiss, they are insufficient to withstand summary judgment, where the factual record is dispositive. *See Gerlinger v. Amazon.com Inc.,* 526 F.3d 1253, 1255-56 (9th Cir. 2008) ("In response to a summary judgment motion or a trial court's post-pleading stage order to establish Article III standing, a plaintiff can no longer rest on 'mere allegations' but must set forth by affidavit or other admissible evidence 'specific facts' as delineated in Federal Rule of Civil Procedure 56(e) as to the existence of such standing.").

or to make any independent expenditures, they have standing to sue. *See Lyons,* 461 U.S. at 101-02.

B. Timeliness

The City asserts that we lack jurisdiction over the Chamber PACs' appeal because their notice of appeal is untimely. A notice of appeal must be filed within thirty days of entry of the order or judgment from which the appeal is taken. Fed. R. App. P. 4(a)(1). With a few exceptions not applicable here, an appeal may be taken only from a final order or judgment. *See* 28 U.S.C. § 1291; *Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424, 430 (1985) ("[T]he final judgment rule promotes efficient judicial administration while at the same time emphasizing the deference appellate courts owe to the district judge's decisions on the many questions of law and fact that arise before judgment."). A judgment is final if it fully adjudicates the issues and clearly evinces the district court's intention that it be that court's final act in the matter. *Disabled Rights Action Comm. v. Las Vegas Events, Inc.,* 375 F.3d 861, 870 (9th Cir. 2004).

The City contends that the Chamber PACs are appealing the May 4, 2007, judgment of the district court, and that their July 23, 2007, notice of appeal is more than fifty days late. However, the May 4, 2007, judgment does not indicate that the district court ruled on, let alone denied, summary judgment to the

three Chamber PACs.[3] That judgment addressed the Chamber only. Therefore, as of May 4, 2007, there was no adverse final judgment from which the Chamber PACs could appeal. It was not until the court filed its July 12, 2007, order that it expressly and finally adjudicated all of the issues related to summary judgment as to the Chamber PACs, effectively denying the Chamber PACs' constitutional challenge. The Chamber PACs timely filed their notice of appeal from that order eleven days later.

The City alternatively argues (for the first time during oral argument) that its own notice of appeal from the April 11, 2007, order divested the district court of jurisdiction to enter a subsequent order resolving the Chamber PACs' motion. *See* Fed. R. Civ. P. 60(a) (requiring district court to obtain leave of appellate court to issue clarification once a notice of appeal has been filed). However, "where an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters not involved in the appeal." *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1411 (9th Cir. 1990) (citation and internal

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[3] It is apparent that the City itself created any ambiguity that the May 4, 2007, judgment presented. The City drafted the order later adopted by the district court, which altered the language used by the district court in its April 11 order from "Plaintiffs" to "Plaintiff Long Beach Area Chamber of Commerce." That order also omitted any reference to the Chamber PACs, unlike Plaintiffs' proposed form of order which granted judgment in favor of "Plaintiffs."

quotation marks omitted); *see also Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (notice of appeal divests the district court of "control over those aspects of the case involved in the appeal"). The district court entered judgment granting the motion as to the Chamber on May 4, 2007, and the City's notice of appeal was timely filed, thus vesting our court with jurisdiction over that matter. Because the district court's May 4, 2007, judgment did not deny the motion as to the Chamber PACs, however, the district court retained jurisdiction over that motion and was free to clarify it or rule on it if the court had not previously done so. Moreover, if we were to accept the City's argument that the May 4, 2007, grant of summary judgment embraced the Chamber PACs' claim, there was no adverse judgment from which the Chamber PACs could appeal. Therefore, the district court acted wholly within its jurisdictional bounds when it issued the July 12, 2007, order. The Chamber PACs' notice of appeal was timely filed, and we have jurisdiction to review it. Although it follows from this conclusion that the City's appeal was filed prematurely, we also have jurisdiction over that appeal because "orders adjudicating only some of the claims may be treated as final orders if the remaining claims have subsequently been finalized." *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680 (9th Cir. 1980).

II. First Amendment Analysis

"In *Buckley* and subsequent cases, [the Supreme Court has] subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign

contributions." *McConnell v. FEC*, 540 U.S. 93, 134 (2003); *see also Lincoln Club*, 292 F.3d at 938 (discussing different levels of scrutiny). "[C]ontribution limitations are permissible as long as the Government demonstrates that the limits are 'closely drawn' to match a 'sufficiently important interest.'" *Randall v. Sorrell*, 548 U.S. 230, 247 (2006); *see also Davis v. FEC*, 128 S.Ct. 2759, 2770 (2008) ("[S]uch limits . . . cannot stand unless they are 'closely drawn' to serve a 'sufficiently important interest.'").[4] By contrast, expenditure limitations are subject to strict scrutiny, which requires narrow tailoring to meet a compelling governmental interest. *See Citizens United*,

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[4] The Supreme Court has not yet explicitly discarded "closely drawn scrutiny," as some Justices have urged. *See, e.g., Randall*, 548 U.S. at 267 (Thomas, J., concurring in the judgment) ("I would overrule *Buckley* and subject both the contribution and expenditure restrictions of Act 64 to strict scrutiny, which they would fail."); *see also McConnell*, 540 U.S. at 137 ("Our application of this less rigorous degree of scrutiny has given rise to significant criticism in the past from our dissenting colleagues."). In *Citizens United*, the Supreme Court stated. "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence Laws that burden political speech are 'subject to strict scrutiny.'" *Citizens United*, 130 S.Ct. at 898 (quoting *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 464 (2007)). It is unclear whether this unqualified statement is the death knell for closely drawn scrutiny or whether it was intended only to reaffirm the long standing principle that expenditure limitations, like those at issue in *Citizens United*, are subject to strict scrutiny. We need not read tea leaves to decide this appeal, however, because, as shown below, the LBCRA is unconstitutional as applied to the Chamber PACs under either "closely drawn" or "strict" scrutiny.

130 S.Ct. at 898; *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 464 (2007). Thus, "the Supreme Court has generally approved statutory limits on contributions to candidates and political parties," but it "has rejected expenditure limits on individuals, groups, candidates, and parties." *Emily's List,* 581 F.3d at 8 (emphasis omitted).

Contribution limitations are treated differently from expenditure limitations because they generally "entail[ ] only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley,* 424 U.S. at 20. They "permit[ ] the symbolic expression of support evidenced by a contribution but do[ ] not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.* at 21. By contrast, "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association." *Id.* at 23. As the *Buckley* Court explained, "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* at 19 n.18. Expenditure limitations may restrict the breadth and depth of political dialogue, and they "preclude[ ] most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Id.* at 22; *see also Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 386-88 (2000) (discussing application of expenditure-contribution distinction to associational rights).

Since *Buckley* was decided, governments at all levels have enacted campaign finance regulations. *See, e.g.*, 2 U.S.C. § 431 et seq. (Federal Election Campaign Act); Cal. Gov't Code § 81000 et seq. (California Political Reform Act); *see also Citizens United,* 130 S.Ct. at 897 (detailing "extensive regulations" of PACs). But "[p]olitical speech is so ingrained in our culture that speakers find ways to circumvent[these] campaign finance laws." *Citizens United,* 130 S.Ct. at 912. As political strategists have devised novel ways to fund electoral politics, legislative bodies have reacted in kind to the "hard lesson of circumvention" by enacting ever-more complicated campaign finance regulations that defy easy classification under *Buckley*'s doctrinal framework. *McConnell,* 540 U.S. at 165. The LBCRA is one such regulation. It limits the amount of contributions an entity may receive while simultaneously prohibiting independent expenditures by any entity that receives contributions exceeding those limitations. As the district court observed, this form of regulation is not subject to easy classification as a contribution limitation or an expenditure limitation.

This appeal does not turn on the LBCRA's technical classification as an expenditure limitation or a contribution limitation, however, because the LBCRA does not withstand scrutiny under the constitutional standards applicable to either type of campaign finance regulation. Though the City identifies several governmental interests that purportedly are served by the LBCRA, it has not shown that any is "sufficiently

important" to support the LBCRA's application to the Chamber PACs in this case.

A. Anti-Distortion Rationale

One of the LBCRA's stated purposes is to provide the City's residents and interest groups with "a fair and equal opportunity to participate in Municipal elective and governmental processes." Long Beach, Cal., Ordinances § 2.01.130(A); *see also id.* § 2.01.130(H) ("To reduce the excessive fund-raising advantage of incumbents and thus encourage competition for elective office."). However, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley,* 424 U.S. at 48-49. Therefore, "the Court has ruled that the Government cannot limit campaign contributions and expenditures to achieve 'equalization.'" *Emily's List,* 581 F.3d at 5. In *Davis,* the Court warned that restricting speech to "'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office." *Davis,* 128 S.Ct. at 2773. The *Davis* Court concluded that "prior decisions . . . provide no support for the proposition that this is a legitimate government objective." *Id.* The Supreme Court recently reaffirmed these views, stating that it is "unlawful" for the government "to command where a person may get his or her information or what distrusted source

he or she may not hear." *Citizens United,* 130 S.Ct. at 908.

In its briefs and at oral argument, the City argued that these principles could be set aside under *Austin v. Mich. Chamber of Commerce,* 494 U.S. 652 (1990), in which the Court upheld restrictions on independent expenditures by corporations, noting that the government had a compelling interest in combating "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *Id.* at 660. However, the Supreme Court has overruled *Austin* and explicitly rejected the "anti-distortion rationale" upon which it rested: "Political speech is indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. . . . This protection for speech is inconsistent with *Austin*'s anti-distortion rationale." *Citizens United,* 130 S.Ct. at 904 (internal quotation marks omitted); *see also id.* at 912-13 (noting that *Austin* "was not well reasoned," "is undermined by experience," and does not implicate any "serious reliance interests"). Therefore, we find unavailing the City's anti-distortion rationale for the LBCRA's application to the Chamber PACs.

B. Time Protection Rationale

The City also states that the LBCRA is intended to "limit overall expenditures in campaigns, thereby reducing the pressure on candidates to raise large

campaign war chests for defensive purposes." Long Beach, Cal., Ordinances § 2.01.130(D); *see also id.* § 2.01.130(I) ("To allow candidates and officeholders to spend a lesser proportion of their time on fund raising and a greater proportion of their time dealing with issues of importance to their constituents."). However, in *Buckley,* the Supreme Court explained that "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley,* 424 U.S. at 57. More recently, the Supreme Court explicitly rejected what it described as the "time protection rationale" for campaign finance regulations, finding "unpersuasive" the argument that government may restrict campaign finance activity "to protect candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters." *Randall,* 548 U.S. at 243-45. Therefore, the City's interest in reducing political fundraising efforts cannot support the LBCRA's application to the Chamber PACs.

C. Anti-Corruption Rationale

Finally, the City advances an anti-corruption rationale to support the LBCRA's application to the Chamber PACs. One of the LBCRA's stated purposes is "[t]o reduce the influence of large contributors with a specific financial stake in matters before the City Council, thus countering the perception that decisions are influenced more by the size of contributions than the best interests of the people of the City." Long

Beach, Cal., Ordinances § 2.01.130(B); *see also id.* § 2.01.130(K) ("To help restore public trust in local governmental and electoral institutions."). In its brief, the City asserts that the LBCRA "prevent[s] corruption or the appearance of corruption" and that the large amount of money spent on City elections "has caused a public perception that votes are being improperly influenced by monetary contributions."

The Supreme Court has concluded that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 496-97 (1985) ("*NCPAC*"); *see also Davis,* 128 S.Ct. at 2773; *Randall,* 548 U.S. at 268. This interest was sometimes broadly construed in the expenditures context before the Supreme Court's recent decision in *Citizens United,* in which it stated: "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption." *Citizens United,* 130 S.Ct. at 909.[5] "The fact that speakers may have

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[5] We do not fault the City for its failure to narrow its asserted anti corruption interest to quid pro quo corruption only, as opposed to money spent to obtain "influence over or access to elected officials." *Citizens United,* 130 S Ct. at 910. The City did not have the benefit of the Supreme Court's recent decision in *Citizens United* when it enacted the LBCRA or when it defended the LBCRA's constitutionality before the district court and on appeal. Before *Citizens United* was decided, it was unclear whether

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influence over or access to elected officials does not mean that these officials are corrupt," and "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy." *Id.* at 910.

Supreme Court precedent forecloses the City's argument that independent expenditures by independent expenditure committees ("IECs"), like the Chamber PACs, raise the specter of corruption or the appearance thereof. Moreover, the City's broadly based anti-corruption rationale for restricting contributions to IECs is lacking in legal and factual support because the City has not offered sufficient evidence of corruption to support its asserted governmental interest in restricting contributions to IECs.

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expenditures regulations were reviewed in light of the broader definition of "corruption" reflected in the City's arguments. *See, e.g , Shrink Mo.,* 528 U.S. at 389 ("In speaking of 'improper influence' and 'opportunities for abuse' in addition to 'quid pro quo arrangements,' we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery." (quoting *Buckley,* 424 U.S. at 28)); *McConnell,* 540 U.S. at 143 ("Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits. We have not limited that interest to the elimination of cash-for-votes exchanges ").

1. Expenditure Limitations

"By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Citizens United,* 130 S.Ct. at 910. An expenditure that is made with the control, direction, cooperation, consultation, coordination, request, or suggestion of a candidate is a contribution, not an independent expenditure. Cal. Gov't Code § 82015; Cal. Admin. Code tit. 2, § 18225.7. For instance, the Chamber PACs could be subject to criminal liability if they made payments in coordination with candidates or their campaigns but failed to disclose the payments as contributions. *See* Cal. Gov't Code §§ 84200, 84211, 91000. It is "'[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent [that] alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.'" *Citizens United,* 130 S.Ct. at 908 (quoting *Buckley,* 424 U.S. at 47); *see also FEC v. Colo. Republican Fed. Campaign Comm.,* 533 U.S. 431, 452 (2001) (*Colorado II*) (distinguishing between "independent" and "coordinated" expenditures). In short, "independent expenditures . . . do not give rise to corruption or the appearance of corruption." *Citizens United,* 130 S.Ct. at 909; *see also NCPAC,* 470 U.S. at 497 ("[There is] no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption.").

It necessarily follows that the City may not impose financial limits on the Chamber PACs' independent

expenditures. This conclusion is compelled by the long and growing line of Supreme Court cases concluding that limitations on independent expenditures are unconstitutional. *See Buckley,* 424 U.S. at 45 ("We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify § 608(e)(1)'s ceiling on independent expenditures."); *Colo. Republican Fed. Campaign Comm. v. FEC,* 518 U.S. 604, 618 (1996) ("*Colorado I*") ("We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties."); *Randall,* 548 U.S. at 246 (limitations on independent expenditures by candidates violate the First Amendment); *NCPAC,* 470 U.S. at 499 ("A tendency to demonstrate distrust of PACs is not sufficient" to sustain a restriction on their expenditures); *Citizens United,* 130 S.Ct. at 913 (limitations on independent expenditures by corporations violate the First Amendment).

2. Contribution Limitations

Nor has the City shown that contributions to the Chamber PACs for use as independent expenditures raise the specter of corruption or the appearance thereof. The Supreme Court has upheld limitations on contributions to entities whose relationships with candidates are sufficiently close to justify concerns about corruption or the appearance thereof. For example, in *McConnell,* the Supreme Court upheld

limitations on contributions to political parties because "the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, . . . have made all large soft-money contributions to national parties suspect." *McConnell,* 540 U.S. at 154-55. Similarly, in *California Medical Association v. FEC,* 453 U.S. 182 (1981), the Supreme Court upheld limitations on contributions to "multicandidate political committees" because their close relationship with candidates and office holders made them "conduits for contributions to candidates, and as such they pose[d] a perceived threat of actual or potential corruption." *Id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment); *see also id.* at 197 (maj. op.) ("[T]he rights of a contributor are . . . not impaired by limits on the amount he may give to a multicandidate political committee . . . which advocates the views and candidacies of a number of candidates.").

However, the need for contribution limitations to combat corruption or the appearance thereof tends to decrease as the link between the candidate and the regulated entity becomes more attenuated. As the Fourth Circuit has aptly explained:

> Unsurprisingly, the strength of the state's interest in preventing corruption is highly correlated to the nature of the contribution's recipient. Thus, the state's interest in the prevention of corruption – and, therefore, its power to impose contribution limits – is

> strongest when the state limits contributions made directly to political candidates. . . . As one moves away from the case in which a donor gives money directly to a candidate, however, the state's interest in preventing corruption necessarily decreases.

N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 291 (4th Cir. 2008). The D.C. Circuit has since endorsed this rationale. *See Emily's List,* 581 F.3d at 11; *see also id.* at 6 (the anti-corruption interest justifies limits on contributions to parties "[b]ased on the close relationship between candidates and parties").

The Chamber PACs are several significant steps removed from "the case in which a donor gives money directly to a candidate." *Leake,* 525 F.3d at 291. They do not enjoy a "close connection and alignment," "close affiliation," and "nexus" with candidates. *McConnell,* 540 U.S. at 155; *see also Emily's List,* 581 F.3d at 14 ("In sum, it will not work to simply transport *McConnell*'s holding from the political party context to the non-profit setting."). Nor do the Chamber PACs operate as middlemen through which funds merely pass from donors to candidates. *See Cal. Med. Ass'n,* 453 U.S. at 197. They do not coordinate or prearrange their independent expenditures with candidates, and they do not take direction from candidates on how their dollars will be spent.[6] *See Colorado II,* 533 U.S.

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[6] As noted above, if the Chamber PACs did coordinate their expenditures with candidates, those expenditures would lose

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at 457 (discussing "serious threat of abuse" from coordinated expenditures). The Chamber PACs' relationship with candidates is, at best, attenuated. *See Emily's List*, 581 F.3d at 14 ("More fundamentally, non-profit groups do not have the same inherent relationship with federal candidates and officeholders that political parties do.").

In fact, the record reveals only one interaction between the Chamber PACs and candidates for City office: interviews that the Chamber PACs' ten-member executive board conducts before deciding which candidates to support. Among the factors that the board considers is the candidate's position on policy questions affecting local businesses' ability to operate in the City. This fact alone does not support the City's anti-corruption rationale for applying the LBCRA to the Chamber PACs.[7] It comes as no surprise that the Chamber PACs would take appropriate steps to make informed decisions about how to spend their contributors' money. *See NCPAC*, 470 U.S. at 495 ("[T]he contributors obviously like the message they are

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their "independent" status and would be subject to regulations governing contributions.

[7] The matter before us might be different if there were evidence that these interviews ended with a "wink and a nod" between the candidate and the Chamber PACs. For one thing, as noted above, such dealings could be subject to criminal prosecution to the extent that they actually transformed "independent expenditures" into "contributions" that were not disclosed as such. *See* Cal Gov't Code §§ 82015, 91000; Cal Admin. Code tit. 2 § 18225.7.

hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money."). Though the City argues in its brief that "collective experience" indicates that "unrestricted financial contributions to . . . IECs have a corruptive influence," the City fails to identify a single fact or event to support that contention. Thus, "[o]n this record, . . . an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more." *Id.* at 498.

The City has even stipulated that it "is unaware of any instances of quid pro quo corruption of candidates in Long Beach municipal elections caused by contributions to independent expenditure committees, either since adoption of the Ordinance or which served as a basis for the Ordinance." This is hardly surprising "[g]iven the remove of independent expenditure committees from candidates themselves." *Leake,* 525 F.3d at 293. Tellingly, the only IEC activity that is even discussed in the record is a stipulation that, during the 2002 City election cycle, an IEC created and distributed a mailer supporting a candidate after the IEC had received contributions in excess of the LBCRA's limits. We are not told whether the candidate ever had any contact with the IEC, whether the money received or spent by the IEC had any corrupting influence on City politics, whether the voters suspected the IEC of corrupting the political process, or even whether the candidate won the race. The City's inability to identify a single instance of corruption, quid pro quo or otherwise, involving

contributions to IECs for use as independent expenditures undermines its contention that the LBCRA's application to the Chamber PACs furthers its interest in combating corruption or the appearance thereof. *See Emily's List,* 581 F.3d at 14 ("Unlike the political parties examined in *McConnell,* there is no record evidence that non-profit entities have sold access to federal candidates and officeholders in exchange for large contributions."); *cf. SpeechNow.org v. FEC,* ___ F.3d ___ 2010 WL 1133857, at *16 (D.C. Cir. 2010) ("[B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations."). As Justice Blackmun noted in his concurrence in *California Medical Association,* "[C]ontributions to a committee that makes only independent expenditures pose no such threat [of corruption]." *Cal. Med. Ass'n,* 453 U.S. at 203.

Perhaps recognizing the deficiency of the evidentiary record before the district court, the California League of Cities ("League"), as amicus curiae, attempts to bolster the City's appeal, filing the texts of ordinances from other California municipalities as well as two reports documenting the rise of IECs and IEC spending. The League offers the two reports as "new and compelling evidence" supporting the City's anti-corruption rationale for the LBCRA. However, the district court was the appropriate forum in which to introduce this "evidence," and we refrain from

usurping that court's function by entertaining new evidentiary submissions on appeal. *See* Fed. R. App. P. 10(a)(1) (record on appeal consists of original papers and records filed in the district court); *Barcamerica Int'l USA v. Tyfield Imps., Inc.*, 289 F.3d 589, 594 (9th Cir. 2002) (papers not filed in district court are not part of record on appeal). Second, we appreciate the League's observation that "[a] significant number of cities, including many of the largest municipalities, have adopted laws that limit contributions to independent committees that support or oppose candidates for local office." However, we can only decide the appeal before us, and our holding today extends only to the LBCRA as applied to the Chamber PACs and similarly situated entities.

Finally, the City urges that the LBCRA's enactment through voter initiative demonstrates a general perception of corruption in City politics. However, as noted above, the LBCRA covers "any person," the definition of which extends far beyond IECs. City of Long Beach, Cal., Ordinances § 2.01.210(D). The City provides no information about the basis upon which the voters acted, and it would be purely speculative to conclude that passage of the LBCRA was a referendum on IECs in particular given the breadth of the LBCRA's coverage. Even if the law were a referendum on IECs, we could infer little from that fact; voters might have many reasons to want to silence those organizations that have nothing whatsoever to do with corruption.

In sum, the City offers no basis on which to conclude that the Chamber PACs have the sort of close relationship with candidates that supports a plausible threat of corruption or the appearance thereof. IECs are intended to provide a distinct medium through which citizens may collectively enjoy and effectuate those expressive freedoms that they are entitled to exercise individually. Many "individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 261 (1986); *see also Colorado I*, 518 U.S. at 637 (1996) (Thomas, J. concurring) ("Political associations allow citizens to pool their resources and make their advocacy more effective."). Just as the soloist's song becomes more powerful when joined by a chorus of people singing along, a citizen's message may become more widely and effectively disseminated when he joins an IEC of like-minded citizens. *See Cal. Med. Ass'n*, 453 U.S. at 203 ("By pooling their resources, adherents of an association amplify their own voices."); *NCPAC*, 470 U.S. at 494 ("NCPAC and FCM are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to 'amplif[y] the voice of their adherents.'" (quoting *Buckley*, 424 U.S. at 22)). Other circuits have endorsed this view of IECs. *See Emily's List*, 581 F.3d at 4 (The First Amendment "safeguards the right of citizens to band together and pool their resources as an unincorporated group or non-profit organization in order

to express their views about policy issues and candidates for public office."); *Leake,* 525 F.3d at 295 ("[I]ndependent expenditure political committees offer an opportunity for ordinary citizens to band together to speak on the issue or issues most important to them."). Nothing in the evidentiary record of this case indicates that the Chamber PACs should be considered differently. Therefore, the City's anti-corruption rationale does not support the LBCRA's limitations on contributions to the Chamber PACs.

CONCLUSION

We conclude that the Chamber lacks standing to challenge the constitutionality of the LBCRA. Therefore, we **VACATE** the district court's grant of summary judgment in favor of the Chamber and remand with instructions to dismiss the Chamber's claim for want of jurisdiction. We also conclude that the Chamber PACs' appeal was timely filed. Because the City has not advanced a governmental interest to support the LBCRA's application to the Chamber PACs, we **REVERSE** the district court's grant of summary judgment in favor of the City and against the Chamber PACs.

VACATED and REMANDED in part; REVERSED in part.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

LONG BEACH AREA CHAMBER OF COMMERCE, et al. Plaintiff(s), vs. CITY OF LONG BEACH, CALIFORNIA, Defendant.	CASE NO. CV 06-1497 PSG(RCx) ORDER ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT (Filed Apr. 10, 2007)

I. INTRODUCTION

The Long Beach Area Chamber of Commerce ("Chamber") and its political action committees (collectively with Chamber, "Plaintiffs") are suing the City of Long Beach, California ("Defendant") for violation of their federal constitutional rights. Specifically, the Plaintiffs bring suit under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202 alleging that the Defendant is violating the Plaintiffs' First Amendment rights, as made applicable to California by the Fourteenth Amendment, by enforcing an ordinance affecting independent expenditure committees (IECs). The Plaintiffs have already sought and received a preliminary injunction restraining the Defendant from enforcing the ordinance. The Plaintiffs have now brought a summary judgment motion asking the Court to rule that Long Beach's ordinance is unconstitutional on its

face and as applied to the Plaintiffs and others similarly situated. The Defendant has also brought a summary judgment motion asking for a ruling that the ordinance is constitutional.

The Court rules that Long Beach's ordinance is unconstitutional as applied to the Plaintiffs and others similarly situated.

II. STATEMENT OF FACTS

The Chamber is a non-profit mutual benefit corporation that participates in the Long Beach municipal electoral process through its affiliated political action committees ("PACs"). (Stipulation of Facts ("Stip."), ¶ 1.) The Chamber receives dues from its approximately 1400 members, and the dues are structured based upon the number of employees working for a particular member. (Stip., ¶¶ 2-3.) Approximately 90% of the Chamber's members are small businesses that employ fewer than 10 employees. (Stip., ¶ 2.)

A. The LBCRA

On June 7, 1994, the City of Long Beach adopted, by voter initiative, the Long Beach Campaign Reform Act, now codified at Title 2, Chapter 1 of the Long Beach Municipal Code ("LBCRA"). (Stip., ¶ 5.) Section 2.01.610 of the LBCRA states:

> Any person who makes independent expenditures supporting or opposing a candidate

> shall not accept *any* contribution in excess of the amounts set forth in Section 2.01.310.

The Long Beach Campaign Reform Act, Ord. C-7283 § 1.160 (emphasis added). Currently, the contribution limits imposed by Section 2.01.310(b) ("Section 310(b)") and Section 2.01.610 ("Section 610") are $350 for committees making independent expenditures in city council races, $450 in city-wide non-mayoral races (city attorney, city auditor, and city prosecutor), and $650 in mayoral races. (Stip., ¶ 7.) These contribution limits are adjusted to reflect inflationary changes based upon the Consumer Price Index. (Stip., ¶ 8.) Section 2.01.310(B), before inflationary change adjustment, states:

> For primary and general elections, no person shall make to any committee which supports or opposes a candidate and no such committee shall accept from each such person a contribution or contributions totaling more than two hundred fifty dollars ($250.00) for the primary election and two hundred fifty dollars ($250.00) for the runoff election for city council members, three hundred fifty dollars ($350.00) for the primary election and three hundred fifty dollars ($350.00) for the runoff election for city attorney, city auditor or city prosecutor, or five hundred dollars ($500.00) for the primary election and five hundred dollars ($500.00) for the runoff election for mayor.

The Long Beach Campaign Reform Act, Ord. C-7283 § 1.130(B).

When Long Beach passed the LBCRA, the city codified several findings and purposes for the ordinance. Section 2.01.120 declared:

> A. Monetary contributions to political campaigns are a legitimate form of participation in the political process, but the financial strength of certain individuals or organizations should not permit the exercise of a disproportionate or controlling influence on the election of candidates.
>
> B. The rapidly increasing costs of political campaigns have forced many candidates to raise larger and larger amounts of money from individuals and interest groups with a specific financial stake in matters before the City Council. This has caused a public perception that votes are being improperly influenced by monetary contributions. This perception is undermining the credibility and integrity of the governmental process.

(The Long Beach Campaign Reform Act, Ord. C-7283 § 1.120.)

B. The Effect of the LBCRA on the Chamber

Under the LBCRA, the Chamber's dues constitute "contributions" to it. (Stip., ¶ 10.) Because some of the Chamber's members pay annual dues greater than the contribution limits imposed by Sections 310(b) and 610, the Chamber itself is barred from making any independent expenditures in Long Beach municipal elections. (Stip., ¶ 11.) Similarly, the

Chamber's three PACs are prohibited from making *any* independent expenditures in Long Beach municipal elections if the PACs accept contributions in excess of the limits specified in Section 310. (Stip., ¶ 15.) For example, if a PAC accepted a $1000 donation that it used to support a ballot initiative, the PAC would be barred from making any independent expenditures in the mayoral, non-mayoral city-wide, and city council races. (Stip., ¶ 16.) Also, if a PAC accepted a $650 contribution, it could make independent expenditures in mayoral races, but it would be barred from making any independent expenditures in non-mayoral city-wide races or in city council races. (Stip., ¶ 17.)

As construed by the Defendant, the LBCRA forces the Chamber to change its dues or organizational structure if it wishes to make *any* independent expenditures in Long Beach municipal elections. Currently, the annual dues for businesses with less than 10 employees is between $350 and $535 per year. (Stip., ¶ 4.) The dues for businesses with between 10 and 100 employees are currently between $560 and $1,330. (Id.) Some larger employers pay dues in excess of $10,000 based on the number of employees. (Id.) Under the LBCRA, the Chamber is not allowed to have members with more than 10 employees if the Chamber wishes to make *any* independent expenditures in city-wide non-mayoral elections because those members' dues exceed the contribution limit of $450 for city-wide non-mayoral contributions. Therefore, the Chamber is forced to

alter its dues or organizational structure if it wishes to participate in city-wide elections and also wishes to continue to welcome members with more than 10 employees.

LBCRA Sections 310 and 610 do not place restrictions against individuals, acting alone, and who have not made contributions to independent expenditure committees, from personally making independent expenditures in any Long Beach election. (Stip., ¶ 19.)

If the Defendant is not enjoined from enforcing Sections 310(b) and 610, the Chamber will be subject to civil and criminal prosecution for violation of the contribution limits set forth in those sections should the Chamber accept in any given election cycle a contribution or contributions from any person that in the aggregate exceed the limits for that election cycle and in the same election cycle makes independent expenditures in a Long Beach municipal election. (Stip., ¶ 29.)

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) establishes that summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating

the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. *See id.* at 257.

As set forth in the parties' motions for summary judgment and the accompanying stipulation of facts, the sole question presented to the Court is a legal one, namely whether the LBCRA unconstitutionally infringes the Chamber's First Amendment rights.

IV. DISCUSSION

A. The First Amendment Implications

We begin our analysis of Long Beach's campaign finance ordinance by turning to the U.S. Supreme Court for guidance. In its seminal decision on campaign finance laws, *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L. Ed. 2d 659 (1976), the Supreme Court discussed the ability of Congress to restrict both campaign contributions and campaign expenditures in view of the First Amendment.

In deciding a constitutional challenge to the Federal Election Campaign Act of 1971 ("FECA") based on First Amendment grounds, the Court said that FECA's "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates

are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 14 (citing *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L. Ed. 2d 1498 (1957)).

Regarding limits on expenditures, the Court explained that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. . . . The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." *Buckley*, 424 U.S. at 19.

"By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying

basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves very little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.* at 20-21.

Furthermore, "[t]he First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L. Ed. 2d 1488 (1958) stemmed from the Court's recognition that '(e)ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'" *Buckley*, 424 U.S. at 15.

B. Level of Scrutiny Applied to Campaign Finance Laws

In *McConnell v. Federal Elections Commission*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003), the Supreme Court reviewed the progression of its campaign finance jurisprudence from its *Buckley*

decision. "In *Buckley* and subsequent cases, we have subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions. [Citation] In these cases we have recognized that contribution limits, unlike limits on expenditures, 'entai[l] only a marginal restriction upon the contributor's ability to engage in free communication.'" *McConnell*, 540 U.S. at 134-35.

The Supreme Court "recognized that contribution limits may bear 'more heavily on the association right than on freedom to speak,' [Citation] since contributions serve to 'affiliate a person with a candidate' and 'enabl[e] like-minded persons to pool their resources.' [Citation] Unlike expenditure limits, however, which 'preclud[e] most associations from effectively amplifying the voice of their adherents,' contribution limits both 'leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates,' and allow associations 'to aggregate large sums of money to promote effective advocacy.' [Citation] The 'overall effect' of dollar limits on contributions is 'merely to require candidates and political committees to raise funds from a greater number of persons.' [Citation] Thus, a contribution limit involving even 'significant interference' with associational rights is nevertheless valid if it satisfies the 'lesser demand' of being 'closely drawn' to match a 'sufficiently important interest.'" *McConnell,* 540 U.S. 135-36, 124 S.Ct. at 656.

The Ninth Circuit has also expressed its views on the level of scrutiny to apply to laws that limit

campaign expenditures and contributions. The Ninth Circuit has stated that "[s]ubsequent Supreme Court decisions have construed *Buckley* as requiring strict scrutiny of limitations on independent expenditures and lesser constitutional scrutiny of limitations on contributions." *Lincoln Club of Orange County v. City of Irvine, California*, 292 F.3d 934, 938 (9th Cir. 2002). I[n] its own pronouncement, the Ninth Circuit stated that "restrictions on contributions . . . are subjected to less exacting scrutiny than restrictions on independent expenditures." *VanNatta v. Keisling*, 151 F.3d 1215, 1220 (9th Cir. 1998).

C. Level of Scrutiny to Apply to the LBCRA

Following Supreme Court and Ninth Circuit precedent, the Court should decide the level of scrutiny to apply to the LBCRA based on whether it is a restriction on campaign expenditures or a restriction on campaign contributions. A complication arises because the LBCRA can be, and in this case is, characterized as both. This issue lies at the heart of this case.

1. Ninth Circuit Precedent Under *Lincoln Club*

The Chamber argues that the Ninth Circuit decision in *Lincoln Club* is directly on point and should clearly guide the Court's decision in this case. In *Lincoln Club*, the Ninth Circuit considered an Irvine ordinance similar to the LBCRA, and the

Ninth Circuit noted that "neither the Supreme Court nor this Court has squarely confronted a campaign finance law that limits contributions to independent expenditure committees, as does Irvine's Ordinance. Although it is clear expenditure limitations are subject to strict scrutiny and contribution limitations are subject to less than strict scrutiny, our case law has not described the level of scrutiny appropriate for an Ordinance that acts as both an expenditure and a contribution limitation." *Lincoln Club*, 292 F.3d at 937. Independent expenditures, by statutory definition, are expenditures that expressly advocate a clearly identified result in an election but that are not made to or at the behest of the affected candidate or committee. Cal. Govt. Code § 82031. Irvine's ordinance provided that:

> Any person, including any committee, that makes any independent expenditure during an election cycle in support of or opposition to any City candidate, shall not accept any contribution(s) from any person which exceeds in the aggregate the amount set forth in this section for that election cycle.

See Lincoln Club, 292 F.3d at 936. "The contribution limit in place for the two-year [Irvine] election cycle ending with the November 2000 election was $320. A person or committee [was] subject to civil and criminal prosecution for violation of the Ordinance if it accept[ed] during an election cycle contributions from any person that in the aggregate exceed[ed] $320, and in the same election cycle [made] independent

expenditures in support of or in opposition to candidates for office in an Irvine municipal election." *Id.* at 936.

The Ninth Circuit's analysis of the Irvine Ordinance is significant to analyzing the LBCRA. The Ninth Circuit stated:

> "Irvine's Ordinance clearly places a limit on contributions to independent expenditure committees. Although such a restriction burdens speech and associational freedoms, under *Buckley* and its progeny such a restriction does not place a severe burden on protected speech and associational freedoms. This is because *Buckley* does not consider political contributions to be fully protected political speech. Under *Buckley*, political contributions are merely speech by proxy because 'the transformation of contributions into political debate involves speech by someone other than the contributor.' *Buckley*, 424 U.S. at 21, 96 S.Ct. 612. Viewed in light of the speech by proxy rationale, The Lincoln Club's contributors (i.e., its dues-paying members) are merely engaging in speech by proxy because it is the Lincoln Club, and not the contributors themselves, that transforms the members' contributions into political debate. Since the contributions themselves are not fully-protected political speech' under *Buckley* and its progeny, the Ordinance's contribution limit, standing alone, does not warrant strict scrutiny.

However, the Ordinance does not merely restrict contributions. It also restricts expenditures by barring an independent expenditure committee from making any independent expenditures whatsoever if the source of the committee's money is membership dues that exceed the Ordinance's prescribed maximum. This feature of the Ordinance burdens protected speech and associational interests in two important ways. First, if The Lincoln Club maintains its present organizational structure, it will continue to be precluded from making any political expenditures whatsoever in Irvine municipal elections. Second, if The Lincoln Club chooses to comply with the Ordinance, it will have to make dramatic changes to its organizational structure. In order to comply with the Ordinance, The Lincoln Club would need to reduce its annual dues from $2,000 to $160 (½ of the $320 currently permitted under the Ordinance per 2 year election cycle). If the Lincoln Club were to reduce its annual dues from $2,000 to $160 in order to accommodate the Ordinance's $320 limit, The Lincoln Club would also need to expand its membership from the current level of approximately 300 members to approximately 3,750 members in order to maintain the same funding level that it currently enjoys. The Ordinance's expenditure limitation is a double-edged sword, placing a substantial burden on protected speech (i.e., barring expenditures) while simultaneously threatening to *burden associational freedoms* (i.e., by requiring a

> restructuring of The Lincoln Club). We conclude that such substantial burdens on protected speech and associational freedoms necessitate application of strict scrutiny to the Ordinance."

Lincoln Club, 292 F.3d at 938-39 (emphasis added).

As is clear from a comparison of Irvine's Ordinance to the LBCRA, the ordinances are very similar. The Defendant also acknowledged this by stating that "the *Lincoln Club* Court considered a very similar statute . . . " (Opposition to the Plaintiffs' Motion for Summary Judgment ("Def.'s Opp."), p. 1). Because of the similarities between the statutes, the Chamber argues that *Lincoln Club* should control the level of scrutiny to apply in this case.

The Defendant presents two primary arguments to refute the Plaintiffs' reliance on *Lincoln Club*. First, the Defendant argues that Lincoln Club is *factually* distinguishable. Second, the Defendant argues that the Supreme Court's *McConnell* decision has changed the landscape of campaign finance law after *Lincoln Club*, and therefore, *Lincoln Club* has questionable precedential value now.

The Defendant first points out that, in *Lincoln Club*, Irvine's Ordinance was not ruled unconstitutional *on its face*. Instead, the Ninth Circuit considered the "purpose and effect" of Irvine's Ordinance when deciding that strict scrutiny should be applied. When the district court on remand ruled Irvine's Ordinance unconstitutional, it ruled that the statute

was unconstitutional *as applied* to the plaintiff in that case and to others similarly situated.[1] (Plaintiffs' Motion for Summary Judgment ("P.s' MSJ"), Exh. A.)

Here, the Defendant argues that the ordinance is facially valid and that, as applied to the Plaintiff, the ordinance does not affect the Chamber's ability to make expenditures on political campaigns. By its express terms, the ordinance does not limit expenditures the Chamber can make on political campaigns. Instead, the ordinance limits the size of contributions the Chamber may receive if it wishes to make campaign expenditures. This was also the situation in *Lincoln Club*, but in that case, the Ninth Circuit found that the Lincoln Club's First Amendment associational rights were infringed because its organizational structure had to be drastically changed if the Lincoln Club decided it wished to make *any* campaign expenditure's. *See Lincoln Club*, 292 F.3d at 938-39. The Lincoln Club would have been required to cut its dues from $2000 per year to $160 per year in order to make any campaign expenditures, and this was a substantial burden on the Lincoln Club's First Amendment associational rights. *Id.*

In this case, however, the Defendant argues that no substantial burden on associational rights is

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[1] Both Plaintiffs and Defendant attach copies of ordinances and district court decisions as exhibits to their papers. Although the exhibits lack authentication, the Court takes judicial notice that they are authentic.

placed on the Chamber by the LBCRA. Unlike the Lincoln Club, the Defendant argues that the Chamber is not entirely precluded from making any campaign expenditures. The Defendant states that

> "to the extent constituent members of the [Chamber] wish to contribute funds for political speech, such members are free to contribute funds to the PACs affiliated with the [Chamber] in amounts that comply with the ordinance, and in turn those PACs are free to make independent expenditures, in furtherance of political speech."

(Defendant's Motion for Summary Judgment ("Def.'s MSJ"), p. 19.) The Defendant further states that

> "Unlike the Lincoln Club, the Chamber's membership dues do not tantamount to contributions to its PACs. Chamber dues are used for a variety of purposes, including promoting business, educational practices, and lobbying. Instead of automatically applying dues to an IEC, the Chamber elicits voluntary contributions from members, distinct and apart from its dues . . .
>
> Additionally, unlike the massive organizational restructuring that Irvine's ordinances would have required of the Lincoln Club, no similar concerns exist in the instant case. The Chamber's due structure is based on the size of the business applying for

> membership. This structure is not effected at all by the City's ordinance."

(Def.'s Opp. to Plaintiffs' MSJ, p. 6.)

The Defendant's attempt to distinguish *Lincoln Club* fails for two primary reasons. First, the Defendant has stipulated that because some of the Chamber's members pay annual dues greater than the contribution limits imposed by the LBCRA, the Chamber itself is barred from making any independent expenditures in Long Beach municipal elections. (Stip., ¶ 11.) While the Chamber might contain PACs that are organizationally distinct, the Chamber itself is barred from making independent expenditures under the LBCRA. Whether or not the Chamber contains PACs is irrelevant to the question of whether the LBCRA violates the Chamber's own constitutional rights. Second, the Defendant has also stipulated that all dues the Chamber receives qualify as "contributions" under the LBCRA, whether or not those dues are used for political expenditures. (Stip., ¶ 10.) Thus, contrary to the Defendant's contention, the Chamber would have to change its dues and organizational structure if it wished to make independent expenditures.

Because the Defendant has failed to convince the Court that *Lincoln Club* is distinguishable from the present case, the Defendant's argument for lower scrutiny hinges on whether the Supreme Court's *McConnell* decision supersedes *Lincoln Club*.

2. Campaign Finance Regulation After *McConnell v. FEC*

In its 2003 *McConnell* decision, the Supreme Court considered constitutional challenges to the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which contained several amendments to FECA. In upholding the BCRA provisions, the Supreme Court considered Congress's regulation of "soft money" donations, donations "made solely for the purpose of influencing state or local elections" (unaffected by FECA's regulation of federal election donations). *McConnell*, 540 U.S. at 122. In upholding §§ 323(a) and 323(b) of BCRA, the Court noted that

> "while §323(a) prohibits national parties from receiving or spending nonfederal money, and §323(b) prohibits state party committees from spending nonfederal money on federal election activities, neither provision in any way limits the total amount of money parties can spend. 2 U.S.C. §§ 441(i)(a),(b) (Supp. II). Rather, they simply limit the source and individual amount of donations. That they do so by prohibiting the spending of soft money does not render them expenditure limitations."

Id. at 139.

The facts and reasoning from *McConnell* can be distinguished from *Lincoln Club*. In *Lincoln Club*, the Irvine ordinance could have been viewed as simply limiting the source and individual amounts of donations to independent expenditure committees, just as

BCRA's provisions were viewed in *McConnell*. However, in *Lincoln Club*, the ordinance prohibited the plaintiff from making *any* independent expenditures because of its organizational structure. If the plaintiff wished to make independent expenditures, it would have been forced to drastically alter its dues and organizational structure. Therefore, the plaintiffs First Amendment associational rights were severely infringed by the ordinance. These considerations were not issues in *McConnell*, and therefore, the Court believes *Lincoln Club* is still good law.

For the same reasons, the present case is distinguishable from *McConnell*. Therefore, the Court determines that, under *Lincoln Club*, the LBCRA contains a campaign expenditure limitation that substantially infringes the First Amendment right of association, and the Court must apply strict scrutiny to the LBCRA.

D. Scrutiny Applied to the LBCRA

In *Buckley*, the Supreme Court ruled that because limits on campaign expenditures represent substantial restraints on the quality and diversity of political speech, they are only valid if they "satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley*, 424 U.S. at 45. Exacting scrutiny requires that a law be "narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347, 115 S. Ct. 1511, 131 L. Ed. 2d 426

(1995). The *Buckley* Court found that "the government interest in preventing corruption and the appearance of corruption is inadequate to justify [a] ceiling on independent expenditures." *Buckley*, 424 U.S. at 45-48.

In this case, the Defendant does not argue that the LBCRA can pass strict scrutiny. Indeed, the strongest justification for the LBCRA that the Defendant raises is the threat or perceived threat of corruption in the political process. However, *Buckley* has made clear that the threat or perceived threat of corruption is an inadequate justification for a law that acts as a limitation on campaign expenditures. Because the LBCRA is not narrowly tailored to serve an overriding state interest, it fails strict scrutiny.

V. CONCLUSION

Under the controlling Ninth Circuit precedent, the Court finds that it must examine the LBRCA under strict scrutiny and that the LBCRA fails this scrutiny because it is not narrowly tailored to serve an overriding state interest. Therefore, the Court holds that the LBCRA is unconstitutional, as applied to the Chamber and others similarly situated. The Court grants the Plaintiffs' motion for summary judgment and denies the Defendant's motion for summary judgement.

DATE: 4/10/07 /s/ [Illegible]
PHILIP S. GUTIERREZ
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LONG BEACH AREA CHAMBER OF COMMERCE, a non-profit California mutual benefit corporation, on behalf of itself and its members; et al., Plaintiffs – Appellees, v. CITY OF LONG BEACH, Defendant – Appellant.	No. 07-55691 D.C. No. CV-06-01497-PSG Central District of California, Los Angeles ORDER (Filed Feb. 16, 2010)
LONG BEACH AREA CHAMBER OF COMMERCE, a non-profit California mutual benefit corporation, on behalf of itself and its members; et al., Plaintiffs – Appellants, v. CITY OF LONG BEACH, Defendant – Appellee.	No. 07-56081 D.C. No. CV-06-01497-PSG Central District of California, Los Angeles
LONG BEACH AREA CHAMBER OF COMMERCE, a non-profit California mutual benefit corporation, on behalf of itself and its members; et al., Plaintiffs – Appellees,	No. 07-56190 D.C. No. CV-06-01497-PSG Central District of California, Los Angeles

v.

CITY OF LONG BEACH,

Defendant – Appellant.

Before: KOZINSKI, Chief Judge, D.W. NELSON and WARDLAW, Circuit Judges.

Within fourteen days, the parties are ordered to submit supplemental letter briefs, not to exceed fifteen pages in length, regarding the effect of *Citizens United v. FEC*, ___ S.Ct. ___, 2010 WL 183856, at *31 (Jan. 21, 2010), on this case. The parties' briefs should address the following issues in particular:

1. Does *Citizens United* stand for the proposition that all restrictions on independent expenditures by independent expenditure committees ("EC") are unconstitutional, regardless of the quantum of evidence advanced by the government to justify the restriction?

2. If *Citizens United* stands for the proposition that all restrictions on independent expenditures by IECs are unconstitutional, does it follow that all restrictions on contributions from donors to IECs for use as independent expenditures are also necessarily unconstitutional? If not, on what basis may a government restrict a donor's contributions to an IEC for use as independent expenditures?

3. The *Citizens United* Court stated: "Laws that burden political speech are 'subject to strict scrutiny,'

which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.' *Id.* at * 19 (quoting *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)). Does *Citizens United* thus sub silentio overrule *Lincoln Club of Orange County v. City of Irvine, Cal.*, 292 F.3d 934 (9th Cir. 2002) and *McConnell v. FEC*, 540 U.S. 93 (2003), insofar as those opinions require application of "closely drawn scrutiny" to some campaign finance regulations? If not, in what circumstances does "closely drawn scrutiny" continue to apply to regulations of contributions to, or independent expenditures by, IECs?

In their letter briefs, the parties also may address any other relevant issues raised by *Citizens United*.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV06-1497 PSG (RCx) Date July 12, 2007

Title Long Beach Area Chamber of Commerce, et al. v. City of Long Beach

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy K. Hernandez	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings: Order on Plaintiffs' Motion for Clarification

Before this Court is Plaintiffs' Motion for Clarification. The Court heard oral argument on Plaintiffs' Motion on July 11, 2007. Now, the Court finds the matter appropriate for decision without further oral argument. Fed. R. Civ. P. 78; Local R. 7-15.

I. INTRODUCTION

The Long Beach Area Chamber of Commerce ("Plaintiff Chamber") and its political action committees ("Plaintiff PACs;" collectively with Plaintiff

Chamber "Plaintiffs") are suing the City of Long Beach, California ("Defendant") for violation of their federal constitutional rights. Specifically, Plaintiffs bring suit under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202 alleging that the Defendant is violating the Plaintiffs' First Amendment rights, as made applicable to California by the Fourteenth Amendment, by enforcing an ordinance affecting independent expenditure committees (IECs).

The Court has already issued a summary judgment order on behalf of Plaintiffs in the underlying litigation and a judgment pursuant to said order.

II. STATEMENT OF FACTS

On April 10, 2007, this Court issued its Order on Plaintiffs' and Defendant's Motions for Summary Judgment finding that Long Beach Municipal Code, sections 2.01.310(B) & (C) and 2.01.610 were "unconstitutional as applied to the Plaintiffs and others similarly situated."

On May 1, 2007, the Court issued its Judgment Following Order Granting Summary Judgment. Said order specifically granted judgment for "Plaintiff Long Beach Area Chamber of Commerce and other persons similarly situated as Plaintiff Long Beach Area Chamber of Commerce."

On May 9, 2007, Defendant filed a notice of appeal in the underlying litigation "from the Order granting the plaintiffs summary judgment. . . ."

On June 13, 2007, Plaintiffs filed a motion for an award of attorney's fees on behalf of all Plaintiffs in the underlying litigation.

A disagreement has arisen between the parties as to whether the Court intended the phrase "other persons similarly situated" to include Plaintiff PACs; and if not, whether Plaintiff PACs were a prevailing party or an unsuccessful party in the underlying litigation, or whether Plaintiff PACs' causes of action had yet to be determined by the Court.

Accordingly, Plaintiffs have moved the Court pursuant to Federal Rule of Civil Procedure, Rule 60, for clarification of its May 1, 2007 order.

[III.] DISCUSSION

A. Propriety of Considering Plaintiffs' Motion After Appeal of the Court's April 10, 2007 Order

"[A]s a general rule, a district court is divested of jurisdiction once a notice of appeal has been filed." *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 654 (9th Cir. 1991) (citation omitted). However, in *Morris,* the Ninth Circuit also noted that "when a district court attempts to correct a 'clerical error' under Federal Rule of Civil Procedure 60(a) after a notice of appeal has been filed, and the correction does not represent a change of position, but rather simply clarifies the court's intended action, 'a remand to effectuate that intent is a matter of 'mere form.'. . . . Courts should not employ the rule to defeat this

purpose by 'inducing needless paper shuffling.'" *Id.* at 654-55, Thus, the Ninth Circuit allowed the district court to clarify its original order pursuant to FRCP 60(a) despite the notice of appeal. *Id.* at 655.

In *Blanton v. Anzalone,* 813 F.2d 1574, 1577 (9th Cir. 1987), the Ninth Circuit also stated that "[i]n deciding whether a trial court may alter a judgment pursuant to Fed. R. Civ. P. 60(a), our circuit focuses on what the court *originally intended* to do. . . . A judge may invoke rule 60(a) in order to make a judgment reflect the actual intentions of the court, plus the necessary implications. . . . Errors correctable under Rule 60(a) include those where what is written or recorded is not what the court intended to write or record." The Ninth Circuit further explained that "[t]he basic distinction between 'clerical mistakes' and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of 'blunders in execution' whereas the latter consist of instances where the court *changes its mind,* either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination." *Id.* at 1577 f.n. 2.

Further, in addition being able to correct "clerical mistakes," a district court continues to have jurisdiction to decide issues not already decided and appealed. In *Truliss v. Barton,* 107 F.3d 685, 694 (9th Cir. 1997), the Ninth Circuit allowed a district court to consider an issue in a party's second motion that

was not already on appeal from the denial of the party's first motion. *See also Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control *over those aspects of the case involved in the appeal.*") (emphasis added).

B. Clarification of the Court's April 10, 2007 Order

1. Propriety of Clarification of the Order

In this case, the Court finds it appropriate to provide clarification of its April 10, 2007 order by explicitly ruling on the PACs motions for summary judgment because the Court intended to rule initially on the PACs' motions. Also, the Court finds it appropriate to rule on the PACs at this juncture because, to the extent the April 10 order is not clear, the April 10 order does not decide the issue of the constitutionality of Long Beach's ordinance as applied to the PACs.

2. Clarification of the Order Re: PACs

In the Court's previous April 10, 2007 order on Plaintiffs' motion for summary judgment, the Court considered whether the relevant Long Beach ordinance was constitutional as applied to the Plaintiffs. Now, the Court explicitly finds that the Long Beach ordinance is constitutional as applied to the PACs.

a. Application of the Long Beach Ordinance to the PACs

The PACs are not similarly situated to the Chamber. According to the parties' stipulated facts, "Chambers members wishing to participate in elections may designate a portion of their dues to be diverted to the Chamber PACs." (Parties' Stipulated Facts, ¶ 13.) Also, the "Chamber PACs solicit additional contributions from members as well as from non-Chamber persons." (*Id.*, ¶ 14.) Furthermore, the "Chamber PACs are prohibited from making any independent expenditures in Long Beach municipal elections if they accept contributions in excess of the limits specified in Section 2.10.310 of the [Long Beach ordinance]." (*Id.*, ¶ 15.)

b. Application of Controlling Precedent to the PACs

In the April 10, 2007 order, the Court applied the controlling Ninth Circuit decision in *Lincoln Club of Orange County v. City of Irvine, California,* 292 F.3d 934 (9th Cir. 2002). In that case, the Ninth Circuit found that it had to apply strict scrutiny to the Irvine ordinance at issue because it not only restricted contributions to independent expenditure committees, but it "also restrict[ed] expenditures by barring an independent expenditure committee from making any independent expenditures whatsoever if the source of the committee's money [was] membership dues that exceed[ed] the Ordinance's maximum," *Id.* at 938. In applying the reasoning from the *Lincoln*

Club decision to this case, the Court found that the Long Beach ordinance also required strict scrutiny as applied to the Chamber because the Long Beach ordinance restricted the Chamber's expenditures by barring the Chamber from making any independent campaign expenditures whatsoever because the source of the Chamber's money was membership dues that exceeded the ordinance's maximum.

However, unlike the Chamber, the PACs do not have membership structures that involve member dues that are considered contributions for the purposes of the Long Beach ordinance, The PACs obtain funds from Chamber members, but they also solicit funds from non-Chamber members. In effect, and in contrast to the Chamber, there is no "membership" for the PACs at all. If the PACs wish to expend funds on campaign expenditures, they can do so as long as they follow the requirements of the Long Beach ordinance. Following the Long Beach ordinance does not require the PACs to fundamentally alter their membership dues structures because there are none.

Therefore, because the ordinance does not place a "severe burden on fully protected speech and associational freedoms" as in *Lincoln Club*, the Court will apply "a lower level of constitutional scrutiny" than strict scrutiny. *Id.* at 938. Under that lower level of constitutional scrutiny, "[e]ven a 'significant interference' with protected rights of political association[s'] may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of

associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (citation omitted). The Supreme Court has stated that a "constitutionally sufficient justification" is "limiting the actuality and appearance of corruption resulting from large individual financial contributions." *Id.* at 26.

Here, the parties have stipulated that Defendant's ordinance has a constitutionally sufficient justification. The parties' have stipulated that "[t]he second codified purpose of the [ordinance] is 'to reduce the influence of large contributors with a specific financial stake in matters before the City Council, thus countering the perception that decisions are influenced more by the size of contributions than the best interests of the people of the City.'" (Parties' Stipulated Facts, ¶ 24.) Thus, the Long Beach ordinance, as applied to the PACs, survives constitutional scrutiny.

[IV.] CONCLUSION

For the foregoing reasons, the Court issues this Order Clarifying its April 10, 2007 Order. The Court finds that the relevant Long Beach ordinance, as applied to the PACs and others similarly situated, is constitutional.

_____ : _____

Initials of Preparer _____

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LONG BEACH AREA CHAMBER OF COMMERCE, et al., Plaintiffs, vs. CITY OF LONG BEACH, CALIFORNIA, et al., Defendant.	No. CV~~06-06~~-1497 ~~FMC~~ PSG ~~[DEFENDANT'S PROPOSED]~~ JUDGMENT FOLLOWING ORDER GRANTING SUMMARY JUDGMENT (Filed May 1, 2007)

Following the parties' cross-motions for summary judgment on April 10, 2007, this court issued an order granting Plaintiff Long Beach Area Chamber of Commerce's motion for summary judgment on all causes of action in the underlying matter, denying Defendant's motion for summary judgment on all causes of action in the underlying matter, and GOOD CAUSE APPEARING THEREFOR,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered as follows:

1. Long Beach Municipal Code § 2.01.610 is declared unconstitutional as applied to Plaintiff Long Beach Area Chamber of Commerce and other persons similarly situated as Plaintiff Long Beach Area Chamber of Commerce; and is therefore unenforceable against Plaintiff Long Beach Area Chamber of Commerce and other persons similarly situated.

2. Long Beach Municipal Code 2.01.310, subdivisions (B) and (C), are declared unconstitutional as applied to Plaintiff Long Beach Area Chamber of Commerce and other persons similarly situated as Plaintiff Long Beach Area Chamber of Commerce, to the extent that they place limits upon contributions for independent expenditures; and are therefore unenforceable to that extent against Plaintiffs and other persons similarly situated.

3. Defendant City of Long Beach is hereby permanently enjoined from enforcing the provisions of Long Beach Municipal Code § 2.01.610 against Plaintiff Long Beach Area Chamber of Commerce and other persons similarly situated.

4. Defendant City of Long Beach is hereby permanently enjoined from enforcing the provisions of Long Beach Municipal Code 2.01.310, subdivisions (B) and (C) against Plaintiff Long Beach Area Chamber of Commerce and other persons similarly situated, to the extent that they place limits upon contributions for independent expenditures.

5. Plaintiff Long Beach Area Chamber of Commerce is entitled to an award of costs incurred in the underlying matter, and attorney fees upon proper motion before the court.

DATE: May 1, 2007 /s/ Philip S. Gutierrez
PHILIP S. GUTIERREZ
United States District Judge

NOV 15 2010

No. 10-151

In the Supreme Court of the United States

LARRY DEPEE, a California Highway Patrol Officer, and the STATE OF CALIFORNIA,

Petitioners,

v.

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of John Joseph Wayne Watkins,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the district court did not abuse its discretion in awarding attorney's fees under 42 U.S.C. § 1988 to respondent's counsel, in a case where respondent established that petitioner police officer violated the Constitution by using deadly force against respondent's son but was awarded only nominal damages.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

In *Farrar* v. *Hobby*, 506 U.S. 103 (1992), this Court held that a plaintiff who wins nominal damages is a prevailing party under 42 U.S.C. § 1988, and that such a plaintiff may be eligible for an award of attorney's fees under that statute. 506 U.S. at 112, 115. Respondent is a prevailing party under Section 1988: In 2007, a jury found that petitioner Depee violated the Constitution when he shot and killed respondent's son, although it awarded only nominal damages of one dollar on her 42 U.S.C. § 1983 claim. The district court awarded attorney's fees to respondent, and the court of appeals affirmed that award.

In their petition for certiorari, petitioners fail to demonstrate that any other court of appeals would have reached a different result: They do not show that any other circuit would have reversed, under an abuse-of-discretion standard, a trial court's award of attorney's fees in this unusual case—in which a police officer's excessive force resulted in *death*; in which respondent never specified the dollar amount of compensatory damages she sought for the Section 1983 claim on which she prevailed; and in which the trial court made a novel ruling of law that compensatory damages were unavailable on that claim.

Instead, petitioners simply highlight the unremarkable reality that sometimes courts award attorney's fees in nominal damages cases, and sometimes they do not. That is precisely the result one would expect to follow from *Farrar*. This case accordingly does not merit review by this Court.

1. On December 9, 2003, petitioner Larry Depee, a California Highway Patrol (CHP) officer, observed John Watkins, son of respondent Sylvia Mahach-Watkins, riding his bicycle against traffic on U.S. Highway 101. Petitioner stopped his patrol car in front of Watkins, who ran to a wooded area. Petitioner chased Watkins and a struggle ensued, which ended with Depee drawing his gun and shooting Watkins several times, killing him.

Both courts below recounted respondent's account of what occurred during the shooting, which was based in part on the declaration of a forensic pathologist:

> "[P]laintiff maintains that at the time Depee shot Watkins, Watkins was lying on his left side with his right arm raised up in a 'warding off' gesture, and that Watkins could not have been swinging [Depee's] flashlight at the time of his death [as Depee asserted]. Plaintiff also emphasizes the fact that a fingerprint analysis of Depee's flashlight only revealed one of Watkins' fingerprints on the head area of the flashlight; plaintiff asserts that if Depee's version of events was true, there would be more of Watkins' fingerprints on the flashlight, and that those fingerprints would be on the shaft of the flashlight."

Pet. App. 4 (citation omitted). The court of appeals noted that "[t]he evidence at trial was largely consistent with this narrative" (Pet. App. 4) and that, although the CHP maintained that Depee's actions were appropriate, "we are bound to conclude otherwise, given the unappealed jury verdict that Depee used unconstitutionally excessive force in killing Watkins." Pet. App. 18.

2. After Watkins' death, respondent filed suit in state court under 42 U.S.C. § 1983 and various provisions of California law. State court rules prohibited respondent from seeking a specific dollar amount in damages for her state wrongful death claim, and she did not request a specific amount either for that claim or for her Section 1983 claims.[1] Pet. App. 12. After petitioners removed the case to federal court, respondent filed an amended complaint there. Again, respondent did not specify an amount of damages with respect to any of her claims, including her Section 1983 claims. See First Amended Complaint at 21-22, *Mahach-Watkins* v. *Depee*, No. C-05-1143-SI (N.D. Cal. May 1, 2005).[2]

Three claims proceeded to trial: a Section 1983 Fourteenth Amendment claim by respondent, a Section 1983 Fourth Amendment claim by Watkins' estate, and a state-law wrongful death claim by respondent. The district court held a three-week jury trial, divided into liability and damages phases. Pet. App. 6. At the conclusion of the liability phase of the

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[1] Section 425.10(b) of the California Civil Code provides that "where an action is brought to recover actual or punitive damages for personal injury or wrongful death, the amount demanded shall not be stated * * *." Cal. Code Civ. Proc. § 425.10(b).

[2] Respondent did attach to her first amended complaint a government claim for $10 million in compensation. See First Amended Complaint at 3 (incorporating by reference the government claim as Appendix B). But this was a claim for compensation of respondent Mahach-Watkins in her individual capacity as Watkins' mother (and of Watkins' sister) for their loss of Watkins' companionship and future income stream. See *ibid.* This government claim is distinct from the estate's Section 1983 claim at issue here, which is the federal claim for which the district court awarded attorney's fees.

trial, the jury returned a verdict against petitioners on the estate's Section 1983 Fourth Amendment excessive force claim and on respondent's state-law wrongful death claim. Pet. App. 6.

3. For a violation of Fourth Amendment rights, a plaintiff normally may seek compensatory damages for such things as medical expenses, loss of earnings, mental anguish, and pain and suffering, as well as punitive damages for wanton and willful conduct. *Memphis Community Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306-307 (1986). Here, however, the district court ruled that Watkins' estate could not recover compensatory damages on the Section 1983 claim *as a matter of law* because this was a special case involving excessive force resulting in *death*. The district court noted the absence of circuit precedent on the question of what damages are available for a Section 1983 excessive force claim involving death. It concluded that the available damages are those set forth in California's survival statute, Cal. Code Civ. Proc. § 377.34, which does not allow recovery for the decedent's loss of enjoyment of life or pain and suffering. Pet. App. 13.[3]

Consistent with the district court's ruling, in closing argument respondent's counsel informed the jury that compensatory damages were unavailable on the Section 1983 claim, and that only nominal damages (plus punitive damages) were available. See Resp. App., *infra*, 2a. Respondent never asked for a specific dollar amount in compensatory damages on

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[3] There were no out-of-pocket or medical expenses here because Watkins died prior to receiving medical attention.

the Section 1983 claim.[4] The district court instructed the jury that it could return a compensatory award of no more than one dollar in nominal damages on that claim, irrespective of what the evidence showed. The jury did award one dollar in nominal damages on that claim. Pet. App. 6.

4. Compensatory damages on a state wrongful death claim may be awarded for the plaintiff's loss of the companionship of the decedent and loss of the decedent's future earnings. But Watkins' psychiatric disabilities had rendered him unemployable, he had no dependent wife or children, and he had a troubled relationship with his mother. Pet. App. 3, 7. Thus, compensatory damages were effectively unavailable to respondent with respect to the state wrongful

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[4] Petitioners misleadingly state that respondent's counsel "argued to the jury for compensatory damages of $10 million * * *." Pet. 7. With respect to the Section 1983 claim, however, respondent *never* asked for a specific dollar amount in damages. Respondent's counsel mentioned $10 million *only* in the context of discussing compensatory damages for the *state wrongful death claim*: She compared the loss of an art masterpiece worth $10 to $20 million to respondent's loss of her son. Resp. App., *infra*, 5a. Immediately thereafter, when encouraging the jury to award at least $10 million in compensatory damages on the state-law claim, respondent's counsel referred to the state wrongful death claim as "Claim 1" (Claim 1 actually was the Section 1983 claim). Resp. App., *infra*, 5a. But the context and proximity of this statement to the art masterpiece analogy would have made it clear to the jury that counsel was referring to the state wrongful death claim, not the Section 1983 claim, in suggesting that $10 million was an appropriate compensatory damages award. Indeed, earlier in her argument, respondent's counsel had stated expressly that compensatory damages were unavailable on the Section 1983 claim and that the jury could award no more than nominal damages on that claim. See Resp. App., *infra*, 2a.

death claim on which she prevailed, notwithstanding the jury's finding "that Depee acted improperly in killing her son." Pet. App. 19. The jury awarded one dollar in nominal damages on that claim as well. Pet. App. 6.

5. As the prevailing party in a Section 1983 suit, respondent sought attorney's fees under 42 U.S.C. § 1988. She requested $686,796.74 and was awarded $136,687.35. Petitioners appealed the award of attorney's fees, and respondent cross-appealed the amount of the award. Pet. App. 7.

The court of appeals affirmed the award of attorney's fees, rejecting both appeals. The court first noted the highly deferential abuse-of-discretion standard used to review a district court's award of attorney's fees. Pet. App. 8. The court then proceeded through the three factors bearing on the award of fees discussed by Justice O'Connor in her concurring opinion in *Farrar*.

The court first considered the "difference between the amount recovered and the damages sought." Pet. App. 11 (quoting *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring)). It noted that here, unlike in *Farrar*, respondent did not seek a specified amount of damages. Rather, she asked for an award of compensatory damages "according to proof at trial." Pet. App. 12.[5]

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[5] As we have noted (at notes 2, 4, *supra*), the government claim for $10 million that respondent attached to her first amended complaint is unrelated to the Section 1983 claim at issue here. Thus, the court of appeals properly did not consider it in determining the amount of damages sought by respondent with respect to the Section 1983 claim for which the district court awarded attorney's fees. Petitioners accordingly are incorrect in

The court of appeals also took into consideration that compensatory damages were not available as a matter of law due to the district court's novel application of state-law damages limitations to a Section 1983 claim, a feature of the case that distinguished it from *Farrar*. In *Farrar*, the plaintiff recovered only nominal damages "because of his failure to prove an essential element of his claim for monetary relief"; here, respondent recovered only nominal damages because, as a matter of law, compensatory damages were unavailable. Pet. App. 13-14 (quoting *Farrar*, 506 U.S. at 115). The court of appeals nevertheless opined that the award of nominal damages "somewhat disfavors an award of attorney's fees." Pet. App. 15.

The court turned next to the second *Farrar* factor: the "significance of the legal issue" on which respondent prevailed. Pet. App. 15 (quoting *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring)). On this, after "assess[ing the importance of the issue presented] by comparing it to other issues that our sister circuits have held to qualify as important under this factor," the court had "difficulty imagining a more important issue than the legality of state-sanctioned force resulting in death." Pet. App. 16.

Finally, the court of appeals considered whether respondent's litigation accomplished a "public goal." Pet. App. 17 (quoting *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring)). The court noted that a change in police policy resulting from a lawsuit is a sufficient but not a necessary condition for determining that a lawsuit served such a goal. Here, the court found that respondent's victory achieved tangible re-

contending that the court of appeals "overlooked" the request for $10 million in damages. Pet. 7, 13.

sults in addition to the vindication of her son's constitutional rights: It will likely deter petitioner Depee from engaging in future unconstitutional conduct and will discourage such conduct by "others who establish and implement official policies governing arrests of citizens." Pet. App. 18-19 (quoting *Morales* v. *City of San Rafael*, 96 F.3d 359, 364-365 (9th Cir. 1996)). The court therefore concluded that the third *Farrar* factor counseled in favor of a fee award. Taking all of the factors into account, the court of appeals accordingly affirmed the district court's award of fees, concluding that "[t]he jury did not give [respondent] everything she asked for, but it gave her enough to entitle her to an award of attorney's fees under § 1988." Pet. App. 19.

6. The court of appeals denied panel rehearing and rehearing en banc without dissent. Pet. App. 32-33.

REASONS FOR DENYING THE PETITION

Petitioners' central contention is that this case cannot be distinguished from *Farrar*. But that plainly is not so. *Farrar* involved a plaintiff who established only that his rights had been violated "in some unspecified way." 506 U.S. at 114. Such a verdict, which even the *Farrar* plaintiff "acknowledge[d] [wa]s 'regrettably obtuse,'" "carries no discernable meaning" and "d[oes] not identify the kind of lawless conduct that might be prevented." *Id.* at 122 (O'Connor, J., concurring). Thus, "[i]f ever there was a plaintiff who deserved no attorney's fees at all, that plaintiff [wa]s Joseph Farrar." *Id.* at 117.

The contrast with this case could not be sharper: respondent is a mother whose son, the jury found, was wrongly killed by petitioner Depee's use of ex-

cessive force. It should be needless to say that this is hardly a case where the injury was unclear, the meaning of the verdict obscure, or the prospect of deterring future unconstitutional conduct speculative.

Nor are petitioners on stronger ground in contending that the circuits apply inconsistent standards in determining entitlement to fees under Section 1988. Petitioners have not identified *any* decision from *any* circuit in which a plaintiff who established a violation of constitutional rights resulting in death was not awarded attorney's fees. To the extent that certain of the decisions cited by petitioners nevertheless have upheld fee awards while others have upheld decisions denying fees, that is the natural product of the varying factual situations presented to the courts of appeals and of the abuse-of-discretion standard applied to the review of fee decisions. There is nothing surprising or novel in this: "Civil rights cases often are complex, and [the Court] therefore ha[s] committed the task of calculating attorney's fees to the trial court's discretion for good reason." *Id.* at 123 (White, J., concurring in part and dissenting in part). That explains the outcome here. This case accordingly does not warrant further review.

I. THE DECISION BELOW IS CONSISTENT WITH *FARRAR*.

A. The *Farrar* Factors.

The courts below, like petitioners here, started with the proposition that the principle governing in this case was set out by the Court in *Farrar*, which addressed the entitlement to attorney's fees of a Section 1983 plaintiff who sought recovery of $17 million but was awarded only nominal damages. Although concluding that the plaintiff in *that* case should not

be awarded fees—because the "litigation accomplished little beyond giving petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] their rights had been violated' in some unspecified way," and because the district court awarded fees "without engaging in any measured exercise of discretion" (*id.* at 114 (majority opinion) (citation omitted))—every member of the Court agreed that "a plaintiff who wins nominal damages is a prevailing party under § 1988." *Id.* at 112. See *id.* at 116 (O'Connor, J., concurring) ("Joseph Farrar met that minimum condition for prevailing party status."); *id.* at 123 (White, J., concurring in part and dissenting in part) ("Because Farrar won an enforceable judgment against respondent, he has achieved a 'material alteration' of their legal relationship, and thus he is a 'prevailing party' under the statute.") (citation omitted). Every Justice likewise was in agreement that a prevailing party who is awarded only nominal damages is *eligible* for a fee award. See *id.* at 115 (majority opinion) ("When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is *usually* no fee at all." (citation omitted and emphasis added); *id.* at 120-122 (O'Connor, J., concurring) (articulating factors for determining a fee award); *id.* at 122-123 (White, J., concurring in part and dissenting in part) ("[C]learly, the majority does not" hold that "recovery of nominal damages *never* can support the award of attorney's fees.").

Accordingly, the Court examined in detail Farrar's nominal damages victory. The *Farrar* majority stated that a court "is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Id.* at 114 (majority

opinion) (quoting *Riverside* v. *Rivera*, 477 U.S. 561, 585 (1986) (Powell, J., concurring in the judgment)). And Justice O'Connor, who supplied the fifth vote for the majority, reasoned that "the courts also must look to other factors." *Id.* at 121 (O'Connor, J., concurring). She identified one such factor as the "significance of the legal issue on which the plaintiff claims to have prevailed." *Ibid.* Another is whether the litigation "accomplished some public goal * * *." *Ibid.*

Against this background, three factors bearing on the availability of fees emerge from the Court's decision in *Farrar* and Justice O'Connor's concurrence in that case: (1) the difference between the amount sought and the amount awarded; (2) the legal significance of the issue; and (3) the public importance of the litigation. As discussed below, the courts of appeals—including the Ninth Circuit in this case—have uniformly and consistently applied this standard to determine the reasonableness of a fee award.

B. The Court Of Appeals Correctly Applied *Farrar* In This Case.

In this case, the court below carefully considered the *Farrar* factors in determining that the district court did not abuse its discretion in awarding attorney's fees. See Pet. App. 11 (listing the three *Farrar* factors). That decision surely was correct. This Court held fees presumptively unavailable in *Farrar* both because the plaintiff's failure to obtain a substantial recovery followed from his inability to prove that the defendant caused plaintiff's injury and because the verdict for the plaintiff carried no discernible meaning. This case is different in every particular: respondent proved that petitioner Depee violated the

Constitution by using excessive force, a wrong that directly caused the death of respondent's son and for which substantial damages were held unavailable only because of a quirk in state wrongful death law. This would seem the very definition of a case in which the plaintiff acted reasonably in pursuing litigation and for which fees should be awarded.

1. The First Farrar *Factor: Difference Between Amount Sought And Damages Awarded.*

The court of appeals began its inquiry with an examination of the "difference between the amount of damages sought and recovered." Pet. App. 12.

Respondent did not specify an amount of damages in her first amended complaint. Regarding her Section 1983 claim, respondent sought "only general and punitive damages 'in an amount to be determined according to proof at trial.'" Pet. App. 12 (quoting First Amended Complaint at 22). At no point in the proceedings did respondent request a specific monetary award of damages for this claim. And, most significantly, respondent was denied compensatory damages only because the district court held, in a decision of first impression, that California state law governs in Section 1983 wrongful death actions and precludes "recovery for the decedent's loss of enjoyment of life, or the decedent's pain and suffering." Pet. App. 12, 13 (quoting Order Denying Plaintiff's Motion for Partial New Trial on Damages, *Mahach-Watkins*, No. C-05-1143-SI, 2007 WL 3238691 (N.D. Cal. Oct. 31, 2007)).

On this, comparison to *Farrar* is instructive. The *Farrar* plaintiff sought $17 million and was awarded $1. See 506 U.S. at 106-107. The nominal damages

award resulted from the *Farrar* plaintiff's failure to prove proximate cause, an essential element of his claim. See *id.* at 115. Respondent here, in contrast, did not fail to obtain a specific requested amount and, in particular, did not fail to obtain the amount sought because of an inability to establish an element of her claim. And respondent did prove, of course, that petitioner Depee's unconstitutional conduct resulted in the death of her son.

Even so, the court below concluded that the first *Farrar* "factor somewhat disfavors an award of attorney's fees." Pet. App. 15. There is reason to doubt that is correct: nothing in *Farrar* militates against the award of fees where, as here, the plaintiff proved her case and obtained all the compensatory damages to which the law entitled her. But at a minimum, where the plaintiff did not request a specific monetary amount—and where an idiosyncratic legal ruling precluded monetary recovery for real and significant injury—the salience of the first *Farrar* consideration is much reduced. Indeed, when a plaintiff does not request a specific monetary award, the "difference between the amount of damages *sought* and recovered" (the linchpin of the *Farrar* holding) is not subject to calculation at all. Pet. App. 12 (emphasis added). This element of the *Farrar* analysis therefore offers petitioners no support.

2. The Second Farrar *Factor: Legal Significance.*

Following Justice O'Connor's *Farrar* concurrence, the court below next examined "the significance of the legal issue on which the plaintiff claims to have prevailed." Pet. App. 15 (quoting *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring)).

In this case, respondent's central submission was that the "state-sanctioned force resulting in death was excessive." Pet. App. 16. Respondent prevailed on this claim. And as the court of appeals expressly recognized, it is "difficult[] [to] imagin[e] a more important issue than the legality of state-sanctioned force resulting in death." Pet. App. 16.

This conclusion would seem to be beyond serious dispute. The nature of the rules that govern the state's use of deadly force "is obviously of supreme importance to anyone who might be subject to such force. But it is also of great importance to a law enforcement officer who is placed in a situation where deadly force may be appropriate." Pet. App. 16. Indeed, limits on the state's exercise of deadly force are central to our nation's democracy and constitutional commitments. *Cf. Roper* v. *Simmons*, 543 U.S. 551, 568 (2005) ("Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force."). Given the obvious significance of the issue presented in this type of suit, the court below properly "conclude[d] that the second factor supports the award of attorney's fees." Pet. App. 16.

3. The Third Farrar *Factor: Public Importance.*

In assessing entitlement to fees, courts also look to whether the litigation "accomplished some public goal other than occupying the time and energy of counsel, court, and client." *Farrar*, 506 U.S. at 121-122 (O'Connor, J., concurring).

In her concurring opinion in *Farrar*, Justice O'Connor recognized that "deter[ring] future lawless conduct" (*id.* at 122) serves such an important public

function. See *Owen* v. *City of Independence*, 445 U.S. 622, 651 (1980) ("[Section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."). Here, the court below concluded that even though the CHP did not sanction Officer Depee, there was an important public statement in the jury's finding that excessive force was used. Pet. App. 17-19. The verdict thus had the deterrent effect of "'helping to protect * * * persons like [Watkins] from being subjected to similar unlawful treatment in the future.'" Pet. App. 19 (quoting *Morales*, 96 F.3d at 364-365).

The importance of a wrongful death suit often extends beyond the case at hand. Excessive force cases frequently attract public scrutiny and outcry. See, *e.g.*, Jesse McKinley, *In California, Protests After Man Dies at Hands of Transit Police*, N.Y. Times, Jan. 8, 2009, http://www.nytimes.com/2009/01/09/us/09oakland.html. And contrary to petitioners' claim that there needs to be "proof in the record" that a "mere nominal damages judgment will alter a defendant's behavior" (Pet. 23), the common sense of the matter suggests that a finding of unconstitutional conduct resulting in death will affect future conduct, by both Depee and other state employees. That is so, the court below explained, because, even though the CHP continued to assert that Depee acted appropriately, "we are bound to conclude otherwise, given the unappealed jury verdict * * *." Pet. App. 18. Given these concerns, the court below correctly "conclude[d] that the third factor favors the award of attorney's fees." Pet. App. 19.

4. Balancing The Farrar *Factors.*

Against this background, the totality of relevant considerations favors the award of fees. As both courts below recognized, the "jury's liability verdict on the Section 1983 claim was hardly a hollow victory for a mother suing for the death of her son." Pet. App. 19. Nothing in that determination warrants this Court's review. To the contrary, "[i]n awarding attorney's fees in this case, the district court wrote a careful order emphasizing the second and third [*Farrar*] factors." Pet. App. 11. Determining whether there is room for disagreement over this balance struck by the district court "is not a matter of general importance on which [this Court's] guidance is needed." *Farrar*, 506 U.S. at 124 (White, J., concurring in part and dissenting in part). Rather, this fact-intensive inquiry is best left, in the first instance, to the expertise of the lower courts. See, *e.g.*, *Pierce* v. *Underwood*, 487 U.S. 552, 558 n.1 (1988) ("It is especially common for issues involving what can broadly be labeled 'supervision of litigation,' * * * to be given abuse-of-discretion review."); *Hensley* v. *Eckerhart*, 461 U.S. 424, 436-437 (1983); *Perdue* v. *Kenny A.*, 130 S. Ct. 1662, 1679 (2010) (Breyer, J., concurring in part and dissenting in part) ("[D]etermining whether a fee enhancement is warranted in a given case is a matter that is committed to the sound discretion of a trial judge, and the function of appellate courts is to review that judge's determination for an abuse of such discretion.") (internal citation and quotation marks omitted). This Court accordingly should leave the rulings below undisturbed.

C. Petitioners' Theory Is Inconsistent With *Farrar*.

Petitioners' contrary view has no basis in the text or policy of Section 1988. The statute "ensures the vindication of important rights, even when large sums of money are not at stake * * *." *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring). But petitioners seek to restrict Section 1988 by granting attorney's fees to nominal damages winners only when the litigation has accomplished some institutional purpose "such as invalidating an unconstitutional policy of the defendant or securing injunctive, declaratory, or class relief." Pet. 26.

That, however, is not what *Farrar* holds or Section 1988 says. Put simply, *Farrar* instructs that prevailing parties must be eligible for attorney's fees under Section 1988. At no point does *Farrar* suggest that plaintiffs who have recovered only nominal damages are *categorically* barred from receiving attorney's fees. Yet if this Court were to adopt petitioners' proposed rule, an entire class of prevailing parties would be excluded from Section 1988's ambit; adding an unconstitutional policy, or a declaratory, injunctive, or class-wide relief requirement, would take away lower-court discretion. Given that district courts oversee civil rights cases from start to finish, petitioners' theory would restrict a trial judge's necessary ability to differentiate one case from another and to award fees to deserving litigants.

Such an outcome would be particularly inappropriate because some civil rights plaintiffs lack Article III standing to seek injunctive or declaratory relief. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983). In the wrongful death suit here, for example, respondent could bring a cause of action under Section 1983

for damages but not for injunctive relief, as she could not demonstrate a likelihood that defendants would repeat their wrongful conduct against her or her son in the future. Petitioners' proposed rule would thus force such plaintiffs to bear their own costs. But limiting attorney's fees in such a fashion would run counter to Congress's view that "fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these [civil rights] laws contain." S. Rep. 94-1011, at 2 (1976). This Court's precedents are in line with the text and purpose of Section 1988. Petitioner's proposed rule is not.

II. THE CIRCUITS APPLY THE *FARRAR* STANDARD TO ASSESS DISTRICT COURT AWARDS OF ATTORNEY'S FEES UNIFORMLY AND CONSISTENTLY.

In addition to their invocation of the holding in *Farrar*, petitioners assert that the circuits are split on four issues: the exceptionality of fee awards in nominal verdict cases; the meaning or application of the second and third *Farrar* factors—the "significance of the legal issue" and whether the litigation served a "public goal"; and the application of *Farrar* to police excessive-force cases. Pet. 18-26. In fact, all four of these supposed conflicts are illusory.

What petitioners present as inconsistencies among the circuit courts are simply differences in language or terminology and the circuits' application of the three *Farrar* factors to nominal damages cases involving vastly different facts and circumstances. When deciding whether to award attorney's fees to plaintiffs in nominal verdict cases, the courts of appeals *all* consistently consider the three *Farrar* fac-

tors articulated by Justice O'Connor: "(1) the difference between the judgment recovered and the recovery sought, (2) the significance of the legal issue on which the plaintiff prevailed and finally, (3) the public purpose served by the litigation." *Maul* v. *Constan*, 23 F.3d 143, 145 (7th Cir. 1994) (citation omitted).[6] The decisions petitioners cite for the alleged splits either are inapposite or illustrate the circuits' faithful application of the *Farrar* factors to cases with vastly different underlying facts, the discretion-intensive task of balancing the *Farrar* factors when they do not all point in the same direction, and the highly deferential abuse-of-discretion standard for reviewing district court attorney's fee awards.

The proof of the pudding here is petitioners' failure to show that identical cases have come out differently in different circuits. And petitioners have not identified *any* case with a fact pattern similar to that in this case—that is, a wrongful death case—in which attorney's fees were not awarded. Thus, petitioners have not demonstrated that respondent's counsel would have been denied attorney's fees had

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[6] See, *e.g.*, *Diaz-Rivera* v. *Rivera-Rodriguez*, 377 F.3d 119, 125 (1st Cir. 2004); *Cabrera* v. *Jakabovitz*, 24 F.3d 372, 393 (2d Cir. 1994); *Jama* v. *Esmor Correctional Servs., Inc.*, 577 F.3d 169, 175-176 (3d Cir. 2009); *Mercer* v. *Duke Univ.*, 401 F.3d 199, 204 (4th Cir. 2005); *Hidden Oaks Ltd.* v. *City of Austin*, 138 F.3d 1036, 1052-1053 (5th Cir. 1998); *Pouillon* v. *Little*, 326 F.3d 713, 716-717 (6th Cir. 2003); *Maul*, 23 F.3d at 145 (7th Cir.); *Muhammad* v. *Lockhart*, 104 F.3d 1069, 1070 (8th Cir. 1997); *Mahach-Watkins*, Pet. App. 11 (9th Cir.); *Koopman* v. *Water Dist. No. 1 of Johnson County*, 41 F.3d 1417, 1420-1421 (10th Cir. 1994); *Gray* ex rel. *Alexander* v. *Bostic*, 613 F.3d 1035, 1040-1042 (11th Cir. 2010); *David* v. *District of Columbia*, 674 F. Supp. 2d 34, 37 (D.D.C. 2009), appeal dismissed, 2010 WL 288342 (D.C. Cir. Jan. 11, 2010).

this case been litigated in a different court of appeals. Certiorari accordingly should be denied: There is no confusion in or conflict among the circuits about the meaning or application of *Farrar* that warrants this Court's attention.

A. There Is No Circuit Split Over The Exceptionality Of Fee Awards In Nominal Damages Cases.

Petitioners begin by asserting that there is a split between the First Circuit and the Second and Eleventh Circuits over the exceptionality of fee awards to nominal damages plaintiffs. Petitioners argue that the First Circuit follows a rule making fee awards in nominal verdict cases nearly automatic, while the Second and Eleventh Circuits have held that such awards should be "rare" or "exceptional." Pet. 18-19. To support their claim regarding the First Circuit, petitioners cite language from *Diaz-Rivera*: "[A]lthough this fee-shifting provision [42 U.S.C. § 1988] is couched in permissive terminology, awards in favor of prevailing civil rights plaintiffs are virtually obligatory." Pet. 18 (quoting *Diaz-Rivera*, 377 F.3d at 124).

The First Circuit, however, made this comment during a general discussion of Section 1988, before it turned more specifically to the *Farrar* opinion and whether a plaintiff who receives nominal damages is entitled to attorney's fees. When it made *that* inquiry, the First Circuit considered the same three *Farrar* factors that the Second and Eleventh Circuits, as well as all other courts of appeals, consider when determining whether nominal damages plaintiffs should receive attorney's fees. See, *e.g.*, *Gray*, 613 F.3d at 1040-1042 (11th Cir.); *Diaz-Rivera*, 377 F.3d at 125 (1st Cir.); *Pino* v. *Locascio*, 101 F.3d 235,

238-239 (2d Cir. 1996). Moreover, the Ninth Circuit never suggested that awards to prevailing parties who win nominal damages are obligatory, which would make the First Circuit's (asserted) suggestion to that effect beside the point here.

B. There Is No Circuit Split Over The Meaning Or Application Of The Second *Farrar* Factor—The "Significance Of The Legal Issue."

Petitioners get no further with their claim that the circuits are split over (i) the meaning of the second *Farrar* factor—the "significance of the legal issue on which the plaintiff claims to have prevailed"—and (ii) when an issue should be deemed "legally significant." Pet. 19-21, 24-26. In fact, the circuits are split in neither way.

1. Meaning Of "Significance Of The Legal Issue."

The courts of appeals almost uniformly agree that the second *Farrar* factor—"significance of the legal issue"—refers to the general legal importance of the plaintiff's successful Section 1983 claim.[7] The only even arguable departure from this consensus has occurred in the Tenth Circuit—not the Ninth—which has interpreted the second *Farrar* factor to re-

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[7] See, *e.g.*, *Diaz-Rivera*, 377 F.3d at 125 (1st Cir.) (interpreting the second *Farrar* factor to require an inquiry into the general legal importance of the issue); *Cabrera*, 24 F.3d at 393 (2d Cir.) (same); *Jama*, 577 F.3d at 175-176 (3d Cir.) (same); *Mercer*, 401 F.3d at 206 (4th Cir.) (same); *Maul*, 23 F.3d at 145 (7th Cir.) (same); *Milton* v. *City of Des Moines*, 47 F.3d 944, 946 (8th Cir. 1995) (same); *Mahach-Watkins*, Pet. App. 15-16 (9th Cir.) (same); *Gray*, 613 F.3d at 1040-1041 (11th Cir.) (same); *David*, 674 F. Supp. 2d at 37 (D.D.C.) (same).

quire not only that the issue on which the plaintiff succeeded be significant, but also that the plaintiff actually and meaningfully prevailed on that issue, within the context of the entire litigation. See, *e.g.*, *Barber* v. *T. D. Williamson, Inc.*, 254 F.3d 1223, 1231 (10th Cir. 2001).[8] It is not at all clear that this difference in the articulation of the standard is meaningful. And if the distinction is thought to warrant the Court's attention, that should await a case from the Tenth Circuit.

Moreover, even if the second *Farrar* factor ought to involve an inquiry into the overall success of the litigation, as suggested by the Tenth Circuit, it is doubtful that "the outcome might well have been different" in this case. Pet. 15. "The core of [respondent's] suit has always been her contention that Depee acted improperly in killing her son. The jury agreed with her, holding under § 1983 that Depee used unconstitutionally excessive force." Pet. App. 19. Respondent thus prevailed on her central claim. In such circumstances, there is no reason to believe that the Tenth Circuit would have disagreed with the court below that respondent achieved meaningful success, given that "the constitutional rights at stake in a wrongful death case are of a different magnitude than those at issue in non-death cases." Pet. App. 12.

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[8] Contrary to petitioners' suggestion, see Pet. 15, the Seventh Circuit does not adhere to the Tenth Circuit's articulation of the second *Farrar* factor. The Seventh Circuit's understanding of the "legal significance" factor is fully consistent with that of the other circuits. See, *e.g.*, *Maul*, 23 F.3d at 145 (7th Cir.) ("Thus we understand the second *Farrar* factor to address the legal import of the constitutional claim on which plaintiff prevailed.").

2. Application Of "Significance Of The Legal Issue."

The circuits' understandings of what counts as a legally significant issue are also consistent. Petitioners assert that some circuits take a non-"restrictive" (Pet. 20) view of what counts as legally significant, and that those circuits' "decisions are in tension with other circuit decisions where the courts have judged the legal issue on which the plaintiff prevailed to be insufficiently significant to justify a fee award." Pet. 19. On examination, however, differences in outcome are attributable to differences in the legal issues at stake.

For example, the court below deemed the issue of "the legality of state-sanctioned force resulting in death" to be significant. Pet. App. 16. In contrast, in *Boston's Children First* v. *City of Boston*, 395 F.3d 10 (1st Cir. 2005), the First Circuit held that the nominal damages award there did "not represent a victory on a significant legal issue" because the lower court never found that the school assignment plan challenged in the case was *unconstitutional*. 395 F.3d at 16-18.[9] These two holdings are completely consistent with one another. In one case, the Ninth Circuit found an issue legally significant; in the other, the First Circuit found a *different* issue not legally significant.

Moreover, some of petitioners' circuit characterizations are curious. For example, petitioners place

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[9] Instead, the district court had "awarded nominal damages on the basis of the defendants' *concession*, which acknowledged the dispositive effect of race in the school assignments * * *, but which rejected any conclusion that the [assignment plan] was unconstitutional." 395 F.3d at 17 (emphasis added).

the Seventh Circuit in the "restrictive" interpretation camp based on *Maul*. Pet. 20. But in *Maul*, the Seventh Circuit determined that "the issue on which the plaintiff there prevailed * * * *was* 'clearly a significant constitutional question.'" Pet. 20 (emphasis added) (quoting *Maul*, 23 F.3d at 145-146).[10] It is unclear how this supports petitioners' characterization of the decision.[11]

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[10] As a faithful adherent to the *Farrar* three-factor test, the *Maul* court went on to consider the other two *Farrar* factors and to take into account that the second factor "is the least important of the three factors," before ultimately concluding that the award of attorney's fees was an abuse of discretion. 23 F.3d at 145-147.

[11] Petitioners also cite decisions from the First, Second, Sixth, and Eleventh Circuits as examples of "restrictive" interpretations of what counts as legally significant. Pet. 19-20. These cases are equally unenlightening.

The First Circuit's determination in *Boston's Children First* that the issue in that case was not legally significant turned on the important fact that the district court *never found defendants' school assignment plan to be unconstitutional*. 395 F.3d at 17-18. Affirmance of the denial of attorney's fees in a case that did not involve a clear violation of the Constitution hardly seems like a "restrictive" interpretation of the legal significance requirement.

The quotation petitioners draw from *Pino* comes from the portion of the Second Circuit's opinion discussing the *third Farrar* factor, as applied in *Cabrera*, 24 F.3d at 393, not the "legal significance" factor. *Pino*, 101 F.3d at 239. *Pino* therefore does not bear on how "restrictively" or "broadly" the Second Circuit interprets the second *Farrar* factor.

In *Pouillon*, the Sixth Circuit did not discuss the significance of the legal issue involved at all: The plaintiff there so minimally succeeded on his claim that the Sixth Circuit found the first *Farrar* factor determinative. 326 F.3d at 717-718.

Petitioners' assignment of other circuits to the non-"restrictive" interpretation camp is equally mysterious. Every decision petitioners cite on this side of the alleged split is a run-of-the-mill abuse-of-discretion case in which the district court awarded attorney's fees and the court of appeals confirmed that the lower court had proceeded through a proper *Farrar* analysis before affirming the fee award.[12] The arbitrary nature of petitioners' characterizations is confirmed by their assignment of the First Circuit to *both sides* of the alleged split (see Pet. 19-20)—which suggests that the courts of appeals are not applying different tests at all, but instead are making fact-specific and nuanced determinations.

C. There Is No Circuit Split On The Application Of The Third *Farrar* Factor—Whether The Litigation Served A "Public Goal."

Petitioners also assert a circuit split over the application of the third *Farrar* factor—whether the litigation served a "public goal"—painting some circuits as adopting a broader reading of the public-goal fac-

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Finally, petitioners cite the Eleventh Circuit's holding in *Gray* ex rel. *Alexander* v. *Bostic*, 570 F.3d 1321 (11th Cir. 2009). This opinion has been rescinded and replaced. See *Gray*, 613 F.3d 1035. The holding in *Gray* "is limited to what counts and what does not when citation-counting is used as a method for assessing the significance of a decision in the plaintiff's favor." *Id.* at 1042. *Gray* is virtually silent on whether the Eleventh Circuit is generally a "restrictive" or "liberal" interpreter of the legal-significance standard.

[12] See, *e.g.*, *Diaz-Rivera*, 377 F.3d at 125 (1st Cir.) (holding that the district court did not abuse its discretion in awarding attorney's fees); *Mercer*, 401 F.3d at 212 (4th Cir.) (same); *Piper* v. *Oliver*, 69 F.3d 875, 877 (8th Cir. 1995) (same); *Jones* v. *Lockhart*, 29 F.3d 422, 424 (8th Cir. 1994) (same).

tor than others. See Pet. 21-22. But once again, the decisions that petitioners cite simply display differences in phraseology and the circuits' application of public-goal factor analysis to vastly different fact patterns. Certain of these decisions state that the plaintiff must establish something more than the bare fact of a constitutional violation to satisfy the public-goal factor;[13] others hold that the plaintiff *did* establish more.[14] These decisions do not present con-

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[13] See *Pino*, 101 F.3d at 239 ("Although we recognize that litigation can accomplish much besides awarding money damages, not every tangential ramification of civil rights litigation *ipso facto* confers a benefit on society. * * * The litigation [must] accomplish[] more than giving the plaintiffs 'the moral satisfaction of knowing that a federal court concluded that their rights had been violated.'") (citation omitted); *Maul*, 23 F.3d at 146 ("The public purpose prong of *Farrar* is * * * not satisfied simply because plaintiff successfully establishes that his constitutional rights have been violated. Something more is needed.").

[14] See *O'Connor* v. *Huard*, 117 F.3d 12, 18 (1st Cir. 1997) ("[T]he district court's order [granting attorney's fees] recognized the importance of providing an incentive to attorneys to represent litigants * * * who seek to vindicate constitutional rights but whose claim may not result in substantial monetary compensation * * * [and in] prevent[ing] 'future abuses of the rights of pretrial detainees.'") (citation omitted); *Muhammad*, 104 F.3d at 1070 ([T]he jury's verdict * * * accomplished a public goal, namely, encouraging governments scrupulously to perform their constitutional duties."); *Piper*, 69 F.3d at 877 ("The district court * * * determined that * * * a public goal had been served by [plaintiff's] victory in encouraging [defendants] to refashion their forfeiture procedures to avoid future illegality. * * * Finding no abuse of discretion in the district court's decision, we affirm."); *Koopman*, 41 F.3d at 1421 ("As a result of this case, [defendant] is on notice that it must provide its employees with constitutionally adequate pretermination and post-termination hearings."). The Ninth Circuit's decision in *Guy* v. *City of San Diego*, 608 F.3d 582 (9th Cir. 2010), cited at Pet. 23 n.6, 26, presents a different issue than the present

tradictory rules or indicate that any circuit would have decided the present case differently than did the court below. In particular, petitioners do not cite a single decision with facts similar to those in the present case—that is, involving excessive force resulting in death—in which no public goal was found. So here, too, the allegation of a conflict is wholly chimerical.

D. The Abuse Of Discretion Standard Of Review On Appeal Explains The "Inconsistent" Results Alleged By Petitioners.

At the end of the petition, petitioners discuss two cases that involved the use by police of excessive force in violation of the plaintiff's Fourth Amendment rights, that resulted in an award of nominal damages, and in which "each plaintiff's vindication was acknowledged * * * to be significant and important to the public." Pet. 25-26; see *Milton*, 47 F.3d 944 (8th Cir.); *Briggs* v. *Marshall*, 93 F.3d 355 (7th Cir. 1996). Petitioners maintain that the appellate courts' affirmance of the district courts' denial of attorney's fees in these cases shows that "the circuits inconsistently apply *Farrar* to nominal verdicts and fee awards in police excessive force cases like the present one." Pet. 24.

As a factual matter, however, there is an obvious and significant distinction between *Milton* and *Briggs*, on one hand, and this case on the other: In *Milton* and *Briggs* excessive force resulted in injury; here, it resulted in death. Thus, petitioners' claim

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case—namely, whether the fee award itself may be taken into account in the *Farrar* public-goal analysis. If the Court is concerned about that question, it should wait for a case in which it is presented.

that "[n]o principled distinctions can be drawn to explain the different outcomes" (Pet. 25) is false.

That respondent's son was killed is a relevant distinction not only because it adds to the significance of the legal issue on which respondent prevailed. It is also material because where, as here, death is swift and pain, suffering, and medical treatment are not at issue before the jury, there is (according to the district court below) nothing for which monetary damages can compensate.[15] In contrast, in cases like *Milton* and *Briggs*, damages *can* compensate for the pain, suffering, and cost associated with recovering from injury. Therefore, the award of only nominal damages here does not reflect respondent's failure to succeed on her Section 1983 claim the way that it did for the plaintiffs in *Milton* and *Briggs*.

In any event, even if there *were* "[n]o principled distinctions" among the three cases, their different outcomes would reflect nothing more than the abuse-of-discretion standard at work—*not*, as petitioners claim, a circuit split over the meaning of the *Farrar* factors. In the decision below, the court of appeals reviewed the district court's decision *to award* attorney's fees under an abuse-of-discretion standard. In *Milton* and *Briggs*, the Seventh and Eighth Circuits applied that standard in reviewing the district

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[15] Of course, with her son's death, respondent lost his companionship and any potential future income stream. But that loss was unrelated to the Section 1983 claim, which was the *estate's* claim. The only compensatory damages that would have been available on the Section 1983 claim—if the judge had not ruled as a matter of law that such damages were unavailable—were damages to compensate for *Watkins'* pain, suffering, medical costs, and loss of enjoyment of life.

courts' decisions *not to award* attorney's fees. All three courts of appeals affirmed the lower courts' decisions because none of the lower courts abused its discretion.

Under this standard, the relevant question is *not* whether the reviewing court would have reached the same result as the trial court were the question one of first impression. See *Nat'l Hockey League* v. *Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). On "the same set of facts, different results could be acceptable" under "appellate review * * * for 'abuse of discretion'" (*Belot* v. *Burge*, 490 F.3d 201, 206 (2d Cir. 2007)), so long as neither choice "constitute[d] a clear error of judgment." *United States* v. *Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (quotation marks and citation omitted). See also *Ledford* v. *Peeples*, 605 F.3d 871, 922 (11th Cir. 2010) ("The relevant inquiry * * * is whether the district court's decision was tenable, or, we might say, 'in the ballpark' of permissible outcomes."). As the Court of Appeals for the D.C. Circuit recently stated:

> There is no inconsistency between our ruling in this case and our ruling in [another case]. In the latter, we held that it was permissible for the district court to [rule as it did]; we did not suggest that it would have been error for the court to [rule as the district court here did]. Here, too, it would have been permissible for the district court to [rule as the trial court in the earlier case did]. We hold only that the court did not abuse its discretion by barring the impeachment. *The different outcomes reflect nothing more than the nature of an "abuse of discretion" standard of review.* Where, as here, two different * * * rulings

> would be reasonable, the standard leaves the choice to the discretion of the trial judge.

United States v. *Fonseca*, 435 F.3d 369, 377 (D.C. Cir. 2006) (emphasis added).

Specifically with respect to appeals involving 42 U.S.C. § 1988, "a reviewing court customarily defers to the trial judge, whose intimate knowledge of the nuances of the underlying case uniquely positions him to construct a condign award." *Gay Officers Action League* v. *Puerto Rico*, 247 F.3d 288, 292 (1st Cir. 2001) (citing *Coutin* v. *Young & Rubicam, Inc.*, 124 F.3d 331, 336 (1st Cir. 1997), and *Lipsett* v. *Blanco*, 975 F.2d 934, 937 (1st Cir. 1992)). Such appropriate deference by the courts of appeals, and "principled distinctions" (Pet. 25) among the cases—not disagreement over the *Farrar* factors—explain the attorney's fee awards in the cases cited by petitioners.

III. THIS CASE IS A POOR VEHICLE WITH WHICH TO CONSIDER THE QUESTION PRESENTED.

Even if petitioners were correct regarding the circuit split they allege, this case would not present a suitable vehicle with which to resolve the issue because it is atypical of attorney's fees litigation in several material respects. First, the parties dispute whether respondent requested a specified amount in damages, which confuses the analysis of the first *Farrar* factor. Compare Pet. 7, 13, with Pet. App. 12. And if the decision below really does rest on the court of appeals' having "overlooked the facts that the plaintiff attached to her complaint a government claim seeking $10 million in damages, and incorporated that claim in her complaint" (Pet. 7; but see

note 2, *supra*), correcting that factual error is hardly the role of this Court. Second, respondent's nominal damages award was brought about by a novel interpretation of state law, a scenario quite distinct from the more usual situation in which the plaintiff failed to prove an element of his or her case.

Finally, this Section 1983 suit involves a claim of excessive force resulting in death, which elevates the importance of respondent's claim. It also means that respondent lacks Article III standing to seek injunctive relief, which would make her ineligible even to seek a fee award under petitioners' proposed standard. If the Court is inclined to address the issue presented here, it would be appropriate to do so in a case that lacks these features.[16]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[16] The Court has denied certiorari in several cases raising similar issues. See *Barrington* v. *Ermine*, 534 U.S. 994 (2001); *Kansas* v. *Brandau*, 526 U.S. 1133 (1999); *Yourdon, Inc.* v. *Bridges*, 520 U.S. 1274 (1997); *Water Dist. No. 1 of Johnson County* v. *Koopman*, 516 U.S. 965 (1995); *Romberg* v. *Nichols*, 516 U.S. 943 (1995); *Milton* v. *Heller*, 516 U.S. 824 (1995); *Peters* v. *Polk County Mem'l Hosp.*, 513 U.S. 807 (1994). If the question presented here arises as frequently as petitioners suggest, a more appropriate vehicle is likely to arise sooner rather than later.

Respectfully submitted.

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NOVEMBER 2010

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SUSAN ILLSTON

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS	)	
Plaintiffs,	)	NO. C 05-01143-SI
vs.	)	
LARRY DEPEE, STATE OF CALIFORNIA, and DOES 1 through 100, Inclusive	)	San Francisco, California Thursday August 9, 2007 8:30 a.m.
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

[Excerpt: page 210, line 15: page 216, line 11]

[MS. BEATIFICATO, Counsel for Plaintiff:] Before I go on—before I get to that, I want to help you with the verdict form, because what you have to assess, first of all, is the damages that have come to Mrs. Mahach-Watkins for the loss of her son. And the jury instructions tell you that that is the compensatory damages or general damages for Mrs. Mahach-Watkins. And you'll have a verdict form. And it

will start out under Claim 1. And now it's up on the screen for you.

And as to Claim 1, it will ask you about the violation of John Watkins' Fourth Amendment rights, his right, which you've already determined was violated, his right to be free from excessive and unreasonable force.

Now there are only two options under Claim 1 that you can award. And the first is nominal damage. You must pick an amount between zero and 1 dollar—it's something which the law considers nominal damages. There is a jury instruction on it to basically say that you've already found there's a violation, and now you've put that amount in.

And then the next thing is punitive damages. And we're going to get into what the standard is for punitive damages, because you have a jury instruction on that. And you will assess the amount that you feel reasonably compensates Mrs. Watkins under the general damages for the third claim, and then the also how much to award in punitive damages.

Let's turn to Claim 3 or for a second. Everything I've spoken about—the society, the loss of the society, the companionship, the care, and the comfort—that all relates to Claim 3. Those kind of damages—they're not applicable under Claim 1. So when you talk and you assess about what the value of John Watkins'—the loss to Mrs. Mahach-Watkins from John Watkins' death, that's all related to Claim 3 under her wrongful-death claim.

And so the choices that you have under there are no damages, which—essentially you would be determining that Mrs. Mahach-Watkins has suffered no loss because of her son's death, which would be com-

pletely contrary to all of the evidence that's been presented, and really just from a basic human-nature standpoint, would just be inconceivable. The second option for you is nominal damages, and then the third is damages.

The third line representing damages are these general compensatory damages that we are speaking about. The value that you determine is—compensates—fully compensates Mrs. Mahach-Watkins for the loss of her son, and specifically the good things that her son brought to her: the society, the comfort, the love, the companionship, the affection, the security, the protection, those sorts of things. You fill in that dollar amount there.

And then the second question that you have to answer with regard to Claim 3 is whether Officer Depee's conduct in shooting and killing John Watkins—that which you already determined was unreasonable and excessive and in violation of the Fourth Amendment—whether that conduct was malicious, oppressive, or in reckless disregard of John Watkins' rights.

And so at this time I want to go to the jury instruction on punitive damages. That jury instruction tells you—it defines for you what reckless disregard of the decedent's rights—what kind of conduct amounts to that, as well as what oppressive or malicious conduct is. And specifically, it states that conduct is malicious if it's accompanied by ill will or spite, or if it is for the purpose of injuring another.

Ladies and gentlemen, there is no doubt about it. When Officer Depee took out his weapon and he fired it at John Watkins, he intended on injuring another. No doubt about that. That's not in dispute. He in-

tended to injure John Watkins. It wasn't an accidental go-off of the gun, and John Wakins happened to be shot. He intended. That meets the definition of conduct that is malicious, but it goes even further than that.

You can find an award of punitive damages just based on conduct that's in reckless disregard of the decedent's rights. And it says that if, under the circumstances, it reflects a complete indifference to the decedent's safety or rights, or the defendant acts in the face of a perceived risk, that his actions will violate the decedent's safety or rights.

Officer Depee shot and killed John Watkins on the night of December 9th, 2003. And he knew what the result of that conduct was going to be. He panicked. He overreacted, and took the life of another human being.

Now, Officer Depee, during the first phase of this trial, tried to convince you that what he did was justified. You've already determined that the defense side was wrong. They weren't justified in shooting and killing John Watkins. And they're going to get up here and argue that there were—that you shouldn't award punitive damages.

Ladies and gentlemen, the jury instruction tells you that the purpose behind awarding punitive damages is to deter this type of conduct; to ensure that some other Sylvia Mahach-Watkins doesn't have to go through this kind of loss; that this kind of thing doesn't happen again.

You see, the only way that we, as a society, can really regulate police behavior and conduct is to send messages, to send messages that this kind of conduct should not happen, to not condone this kind of con-

duct. And unfortunately, the reason for punitive damages—and the purpose behind it is illustrated in the jury instruction—is for deterrence.

Send a message. Let the defendants know that this conduct will not be tolerated by our society. That's your job, as jurors.

Now I want to turn back to, for a second, the damages under Claim 3 before we move on to Claim 1, the general damages.

There is no set formula. I told you that. You're going to have to go back there. And, ladies and gentlemen, if you can, after you return your verdict, look at Mrs. Mahach-Watkins in the eyes and tell her that the number that you put in that verdict form under damages under Claim 3 the third line down—that the number that you put in there is the amount that will reasonably compensate Mrs. Mahach-Watkins for the loss of her—all of those good things that John Watkins brought to her life, we can live with that verdict. We accept that. Just—the number that you fill in on the third line needs to reasonably compensate Mrs. Mahach-Watkins for her loss.

And I'd only submit to you again that if a great masterpiece from an earthly master can be worth at least $10- or $20 million, then what is the value of a masterpiece—John, the masterpiece of Sylvia—from the greatest master of all?

Now, turning to Claim 1, punitive damages, I think at a minimum, the evidence that's before you supports that the number you need to fill in on Claim 1 under general damages is at least $10 million. And then under Claim 1, you need to fill in an amount for punitive damages.

I want to make one thing clear to you. Punitive damages and compensatory or general damages are completely two separate things, and they have two separate purposes. The first is a jury instruction tells you compensatory damages. General damages, the damages from Mrs. Mahach-Watkins under Claim 3 is for the loss of care, comfort, society, and companionship of John Watkins. Completely separate issue. You should decide that first.

Once you determine that amount, the second question you must ask yourself is: do we need to deter this sort of conduct? Is the conduct that Officer Depee engaged in by violating the Fourth Amendment rights of decedent John Watkins, as well as in engaging in conduct that made him liable under the wrongful-death claim—is that conduct which is oppressive, malicious, or done with reckless disregard?

And the answer is unequivocally yes, based on the jury instruction and the definitions that you're given.

So then your last step should be to go ahead and determine an amount of punitive damages that's going to be necessary to send a message to the State of California that this conduct will not be tolerated.

177 (3)

No. 10-151

Supreme Court, U.S.
FILED
NOV 30 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LARRY DEPEE, a California Highway Patrol Officer, and the STATE OF CALIFORNIA,

Petitioners,

v

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of John Joseph Wayne Watkins,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

This Court's seminal decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), guides the federal courts in the exercise of their discretion whether to award attorney fees under 42 U.S.C. § 1988 when a civil rights plaintiff obtains only a nominal judgment on a § 1983 cause of action. Despite a plaintiff's prevailing party status, this Court held that for such a plaintiff "the only reasonable fee is usually no fee at all." *Id.* at 114. The Court ruled that "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Id.*, quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Thus, the Court held that when the plaintiff's objective in a lawsuit is restricted to recovery of damages for herself, her "extent of success" is defined by what damages she recovers. And the Court stated: "Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Id.*, quoting *City of Riverside v. Rivera*, 477 U.S. 561, 585 (1986) (Powell, J., concurring in judgment).

Despite this precise legal prescription, respondent maintains that the *Farrar v. Hobby* presumption of *zero* attorney fees should not apply in her "unusual" case for three reasons. Brief in Opp. 1. First, she argues that the Ninth Circuit properly ignored the discrepancy between the amount of damages sought and the amount of damages awarded because she never "specified" the dollar amount of compensatory

damages sought for her Fourth Amendment § 1983 claim. *Id.* 1, 3, 12, 13. Second, she maintains that the Ninth Circuit properly concluded that the trial judge's ruling denying pain-and-suffering damages for her § 1983 claim justified an award of fees because the jury returned the maximum verdict (one dollar) to which she was entitled. *Id.* 1, 4, 13. Third and lastly, she maintains that, despite *Farrar's* holding that primary consideration be given to the amount of damages awarded as compared to the amount sought, there is ample justification for the Ninth Circuit's conclusion that fees are justified because her claim of excessive force resulted in a significant injury, a death. *Id.* 1, 14.

As set forth more fully below, respondent's contention that she is entitled to fees under *Farrar* because she did not specify the amount of compensatory damages sought for her Fourth Amendment § 1983 claim is undermined, not only by her complaint and closing argument to the jury which sought $10 million, but by an extensive record of efforts on her part seeking significant compensatory damages on behalf of the decedent. Her contention that, because the trial judge ruled that she was not entitled to general damages on the § 1983 claim, she received the maximum verdict to which she was entitled (one dollar) cannot absolve her from *Farrar's* requirement that she show some success in order to justify an award of fees. And finally, her contention that she is entitled to fees under *Farrar* because the excessive force claim resulted in a death is a prescription for fees that is

not authorized by *Farrar* and that is not measurable by any standard. All of these excuses, including the assertion that the constitutional violation resulted in a grave injury, could apply to any number of civil rights actions, and they therefore cannot rebut the presumption of *Farrar* that, where a plaintiff is awarded a nominal judgment only, "the only reasonable fee is usually no fee at all." *Id.* at 114.[1]

ARGUMENT

I. The Ninth Circuit Did Not Correctly Apply The *Farrar* Standard

A. The Court Rejected The Majority Holding In *Farrar* That, In Fixing Fees, Primary Consideration Be Given To The Discrepancy Between The Amount Of Damages Sought And The Damages Awarded

As stated in the petition, the Ninth Circuit ignored the entire operative complaint, expressly

[1] Respondent's recitation of the decision of the court below includes a lengthy quotation citing a forensic pathologist's declaration opposing summary judgment, which the Ninth Circuit itself cited as part of the record. Brief In Opp 2 But this case went up on appeal from a jury verdict, not summary judgment, and the pathologist did not testify at trial. The Ninth Circuit's statement that "[t]he evidence at trial was largely consistent with this narrative" is both inexplicable and inaccurate because the evidence does not appear in the trial record.

incorporating by reference an attached government claim, that specified respondent was seeking $10 million for the death of the decedent, and indeed, respondent argued to the jury for compensatory damages of $10 million.[2] Petition 7; *see* Petitioners' Appendix D, *infra*, 37, 49-53; Brief In Opp., Appendix A, 5a.[3] These are inarguably the two most important points in any litigation, and at these two points, respondent was very clear that she sought significant compensatory damages for the death of her decedent.

In closing argument specifically, respondent's counsel asked the jury to award her client compensatory damages in excess of $10 million, plus an unspecified amount of punitive damages on her Fourth Amendment § 1983 cause of action. Respondent's plea for $10 million in general damages explicitly referred to Claim 1 on the verdict form, which was the Fourth Amendment § 1983 cause of action, rather than Claim 3, which was respondent's separate wrongful

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[2] Respondent admits that she expressly incorporated her $10 million government claim into her complaint, but suggests now that the claim specified damages for loss of companionship and future income for her, and did not specify damages of the decedent for her Fourth Amendment claim. Brief In Opp. 3, fn 2. The suggestion is based on a tortured and unjustified reading of the claim. Appendix D 49-53. The claim does not distinguish between respondent's claims and her claims on behalf of the decedent. Nor does the claim limit the damages sought to only those damages to which respondent is entitled on her claims. *Id.*

[3] Petitioners' Appendix to the Reply Brief consists of excerpts of the record provided to the Ninth Circuit.

death cause of action under state law. Brief In Opp., Appendix A, 5a; Appendix E, *infra*, 55-57. Respondent now insists that she asked the jury for a $10 million verdict only on her state wrongful-death cause of action, and for nothing more than nominal damages on her Fourth Amendment § 1983 claim (*see* Brief In Opp. 4-5, fn 4), but the record speaks for itself.

Moreover, as will be shown presently, between the filing of the complaint seeking $10 million and respondent's plea to the jury for $10 million on her Fourth Amendment § 1983 claim, an extensive record also overlooked by the Ninth Circuit shows that respondent fought hard for significant compensatory damages on her Fourth Amendment § 1983 claim, refuting any contention that the extent of her success should not be measured under *Farrar* because she failed to seek a specific amount of damages against which her nominal damage verdict can be compared.

To begin with, respondent's First Amended Complaint for Damages sets forth respondent's Fourth Amendment § 1983 cause of action, and it expressly pleads and prays for compensatory damages on behalf of the decedent's estate. Appendix D, *infra*, 35, 38-47. Paragraph 76 in that cause of action alleges that respondent and her decedent "suffered great mental and physical pain, suffering and anguish" and "the loss of love, comfort, society, solace and support, all to their damage in a sum to be determined at trial." *Id.* at 47. These are typical categories of general and special damages, for which respondent specifically

asked in the prayer of the complaint. *Id.* at 47-48. And, as set forth above, attached to the complaint was respondent's government claim seeking $10 million in damages for the death of the decedent, which was expressly incorporated by reference as part of the Fourth Amendment § 1983 cause of action on behalf of the decedent. Appendix D, *infra*, 49-53.

In the parties' Joint Pretrial Conference Statement, respondent outlined the damages she was seeking and the evidence she planned to introduce to prove those damages. Appendix F, *infra*, 66-72. She described three categories of "relief prayed", and she specifically distinguished between her own damages for wrongful death under California law and the decedent's (as well as her own) § 1983 civil rights damages. *Id.* at 67-68. Those compensatory damages under § 1983 included special damages for medical expenses and lost income, as well as general damages (pain and suffering). With regard to the decedent's § 1983 damages, which would have been relevant only to the Fourth Amendment § 1983 cause of action, respondent said she planned to introduce the expert testimony of a doctor, who would "testify as to the pain and suffering experienced by Decedent during the time that he was shot and the time that he died." *Id.* at 68.[4] Respondent also included a legal

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[4] Respondent ultimately elected not to present this evidence, so the record contains no evidence at all to prove that the decedent experienced any pain and suffering prior to his death.

argument that she was entitled to seek damages for pain and suffering, as well as punitive damages, on behalf of the decedent under § 1983. *Id.* at 69-70.

Before trial respondent submitted proposed jury instructions in which she again requested compensatory damages for her Fourth Amendment § 1983 cause of action. Respondent requested an instruction on the "Measure of Types of Damages," and specifically listed a claim for compensatory damages for the "mental, physical, emotional pain and suffering experienced by John Watkins prior to his death." Appendix F, *infra*, 73-75.

Respondent continued her campaign for compensatory damages on the Fourth Amendment § 1983 claim even after the verdict of one dollar. She filed a motion for new trial as to damages only. Appendix F, *infra*, 92-95. In that motion she reargued the legal question whether a § 1983 plaintiff may recover pain and suffering damages, despite California's survival statute, stating: "Clearly, the plaintiff was entitled to an instruction of compensatory damages for her son's Section 1983 wrongful death claim." *Id.* at 94. The trial court reaffirmed its earlier decision on this question and denied the respondent's motion for a partial new trial. Appendix E, *infra*, 58-64.

By focusing exclusively on the complaint's failure to specify the amount of damages claimed and failing to consider the entire record, the Ninth Circuit and the respondent make a mockery of the *Farrar*

reasoning requiring that, in fixing fees, the primary consideration be given to the amount of damages awarded as compared to the amount sought. *Farrar*, 506 U.S. at 114. In actuality, the entire record shows that respondent specified the amount of compensatory damages she sought for the death of her son in her government claim incorporated into the complaint and her closing argument to the jury, and she fought hard for significant compensatory damages for more than two years, never once intimating that she would have been perfectly satisfied with only nominal damages to vindicate the claim of civil rights violation. The lower court's analysis guts *Farrar* of any substance and invites counsel simply to refrain from specifying any particular sum for damages as insurance towards an award of fees.

B. The Court Gutted The Majority Holding In *Farrar* By Approving A Fee Award Based On The Trial Judge's Ruling That Respondent Was Not Entitled To Compensatory Damages

The Ninth Circuit's conclusion, echoed by respondent, that the trial judge's ruling denying pain-and-suffering damages weighs in *favor* of a fee award because the jury returned a verdict of one dollar (the maximum respondent was entitled to under law), defies logic and turns on its head *Farrar's* mandate that respondent show some "degree of success" in order to overcome the usual presumption of zero attorney fees in a nominal verdict case. *Farrar*, 506 U.S. at 114.

The record shows that respondent tried hard to persuade the trial judge that pain and suffering damages were available on her § 1983 claim but ultimately failed in that attempt, and she was unable to prove any other compensatory damages as the decedent died before he could receive medical treatment (*see* Brief In Opp. 4, fn 3).

The issue whether respondent could recover compensatory damages for her decedent's pain and suffering under § 1983 was hotly contested and briefed by both sides before trial. Petitioners filed a motion in limine to exclude evidence of decedent's alleged pain and suffering before death. Petitioners argued that California's survival statute did not allow for a survivor (here, respondent herself) to recover for the decedent's pain and suffering damages (*see* Cal. Code Civ. Proc. § 377.34) and that this state law limitation applied to respondent's claim for the decedent's compensatory damages on her Fourth Amendment § 1983 cause of action. Appendix F, *infra*, 76-79. Respondent argued in opposition that California's survival statute is inconsistent with the remedial purpose of § 1983 and, therefore, the decedent's "pain and suffering [should be] recoverable under his Section 1983 claim." *Id.* at 79. Respondent continued to press her argument all the way through trial.[5]

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[5] On the very last day of the trial, with the trial judge still undecided on this question, the parties argued the issue out of the jury's presence about the proposed jury instructions. Appendix F, *infra*, 80-91. Respondent's counsel insisted the relevant

(Continued on following page)

Ultimately, however, the trial court agreed with petitioners' view of the law and relying on the California statute and citing *Venerable v. City of Sacramento*, 185 F. Supp.2d 1128 (E.D. Cal. 2002), the court elected to give a jury instruction that did not include such damages. Appendix G, *infra*, 97-98.

Civil rights cases are difficult cases to prove, and many plaintiffs fail to win compensatory damages either because of the law or a failure of proof. If winning a nominal verdict after trying *and failing* to win compensatory damages can justify an award of substantial fees, private counsel will have every incentive to bring non-meritorious civil rights actions in federal court because a substantial attorney fee award awaits them in the end.

C. The Court's Authorization Of Fees Based On The Gravity Of Decedent's Injury Is Not A Standard Authorized By The Majority Holding In *Farrar*

Respondent reiterates the Ninth Circuit's reasoning that significant attorney fees are authorized

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case law supported her position that respondent was entitled to recover, not just nominal damages, but compensatory damages for the decedent's pain and suffering. *Id.* at 86-87. When the court tentatively agreed with respondent on this point during oral argument, counsel stated. "I obviously agree with the Court, in that the [respondent] is entitled to – as a successor in interest, to get those compensatory damages for Mr. Watkins himself . . . " *Id.* at 91.

because "a police officer's excessive force *results in death.*" Brief In Opp. 14. The majority holding of *Farrar* did not adopt either of Justice O'Conner's two alternative justifications for fixing fees in a § 1983 case – the "significance of the legal issue" and "public purpose" justifications. *See* Petition 9. But even if it had, the Ninth Circuit's announcement of a standard based on the gravity of the injury effectively makes fees the rule rather than the exception – even when only nominal damages are recovered. Unconstitutional force causing death is certainly important, but it is no more or less important than unconstitutional force causing, e.g., permanent brain injury, loss of limbs, long-term psychiatric trauma, or merely cuts and bruises, and it is no more or less important than any other civil right violation causing injury. *See Milton v. Des Moines*, 47 F.3d 944 (8th Cir. 1995), *cert. denied*, 516 U.S. 824 (1995) (plaintiff suffered blows to the head when police beat him with their flashlights, but the circuit court denied attorney fees).

And therein lies the problem with Justice O'Conner's two alternative justifications for fixing an award of fees – they are so vague and imprecise that they create no standard to guide the exercise of judicial discretion. They permit courts to award fees in any civil rights case despite a plaintiff's failure to receive anything more than nominal damages, on the grounds that violations of civil rights are important, or injuries are important, or nominal verdicts serve some public purpose. That these alternative justifications fail to provide meaningful guidance to the lower

courts was recently demonstrated once again by the Ninth Circuit in *Guy v. City of San Diego*, 608 F.3d 582 (9th Cir. 2010), where the court reversed a district court's denial of attorney fees in a nominal-verdict excessive force case. In *Guy*, the plaintiff was sprayed with pepper spray and received only cuts and bruises; the Ninth Circuit justified a fee award on the rationale that the fee award (not the nominal verdict itself) would serve the public purpose of encouraging cities to train police officers to avoid excessive force. Petitioners submit that the inconsistent results in the lower courts occur because the "significance of the legal issue" and "public purpose" justifications are empty standards that invite the federal courts to routinely award significant attorney fees in nominal verdict cases, trumping the majority holding of *Farrar* that "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Farrar*, 506 U.S. at 114.

CONCLUSION

For these reasons and the reasons stated in the petition for certiorari, the petition for certiorari should be granted.

Dated: November 30, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
JAMES M. SCHIAVENZA
Senior Assistant Attorney General
TYLER B. PON
Supervising Deputy Attorney General
S. MICHELE INAN
Deputy Attorney General

DAVID W. HAMILTON
Deputy Attorney General

Counsel for Petitioners Larry Depee and the State of California

APPENDIX D

08-15694

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff-Appellee,

v.

LARRY DEPEE, a California Highway Patrol Officer,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 3:05-cv-01143-SI
The Honorable Susan Illiston, Judge

EXCERPTS OF RECORD

VOLUME II

* * *

[1] IN AND [sic] THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff,

Vs.

LARRY DEPEE, STATE OF CALIFORNIA, and DOES 1 through 100, Inclusive,

Defendants.

CASE NO: C-05-1143-SI

FIRST AMENDED COMPLAINT FOR DAMAGES:

1. **Wrongful Death Based on:**
   a. **Assault and Battery;**
   b. **Negligence;**
   c. **Negligent Hiring, Training and Retention;**
2. **Assault and Battery (Survival Action);**
3. **Negligence (Survival Action);**
4. **Negligent Hiring, Training and Retention;**
5. **Intentional Infliction of Emotional Distress;**
6. **Violations of Civil Rights (42 U.S.C. § 1983);**
7. **Violations of Civil Rights (42 U.S.C. § 1985(3) and 1986, action for neglect to prevent civil rights violation.**

DEMAND FOR JURY

(Filed May 6, 2005)

* * *

[3] 6. In addition to the facts alleged in the following subparagraphs, the following defendants are all sued in their individual and official capacities and all acted within the scope of their employment and under color of state law, to wit, under color of the statutes, ordinances, regulations, policies, customs and usages of the State of California:

(a) Defendant LARRY DEPEE, was at all times a California Highway Patrol Officer;

7. Plaintiff is unaware of the true names and capacities of those Defendants sued herein as DOE Defendants. Plaintiff will amend this complaint to allege said Defendants' true names and capacities when that information becomes known to them. Plaintiff is informed and believes and thereon allege that these DOE Defendants are legally responsible and liable for the incident, injuries and damages hereinafter set forth, and that each of said Defendants proximately caused the injuries and damages by reason of negligent, careless, deliberately indifferent, intentional, willful or wanton misconduct in creating and otherwise causing the incidents, conditions and circumstances hereinafter set forth, or by reason of direct or imputed negligence or vicarious fault or breach of duty arising out of the matters herein alleged. Plaintiff will seek leave to amend this complaint to set forth said true names and identities of the unknown named DOE Defendants when they are ascertained.

8. Plaintiff is informed and believes and thereon allege [sic] that, at all times herein mentioned, each of the Defendants was the agent and/or employee and/or co-conspirator of each of the remaining Defendants, and in doing the things hereinafter alleged, was acting within the scope of such agency, employment and/or conspiracy and with the permission and consent of the other co-defendants.

9. Defendant STATE OF CALIFORNIA is liable pursuant to Government Code § 815.2.

10. On May 19, 2004, Plaintiff presented to Defendant STATE OF CALIFORNIA, pursuant to California Government Code Section 910, a timely written claim for the injuries and damages sustained by Plaintiff as a result of the incident described in this complaint. A copy of those claims are attached hereto as **Exhibit "B"** and incorporated herein by this reference.

* * *

[14] 62. As a result of the above-mentioned conduct of Defendants and each of them, DECEDENT suffered extreme pain and severe mental anguish, as well as mental and physical damage and injury to his mind and body.

FOR THE SIXTH CAUSE OF ACTION

(By Plaintiff SYLVIA MAHACH-WATKINS individually and as Successor in Interest to JOHN JOSEPH WAYNE WATKINS against Defendant DEPEE and DOES 1 through 100 For Violations of Civil Rights [42 U.S.C. Section 1983])

COUNT 1 OF THE SIXTH CAUSE OF ACTION BASED ON VIOLATION OF PLAINTIFF'S AND DECEDENT'S CONSTITUTIONAL RIGHTS AS A RESULT OF THE DEATH OF JOHN JOSEPH WAYNE WATKINS

63. Plaintiff restates and reiterates the foregoing Paragraphs of this complaint as if set forth n [sic] full at this point.

64. This cause of action is to redress the deprivation, under color of statute, ordinance, regulation, policy, custom, practice or usage of a right, privilege and immunity secured to SYLVIA MAHACH-WATKINS and to DECEDENT by the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and the Constitution and laws of the State of California.

65. Plaintiff, SYLVIA MAHACH-WATKINS, is the successor in interest to the Estate of DECEDENT and brings this cause of action in that capacity and in place of DECEDENT who, but for his death, would bring this cause of action. Additionally, Plaintiff, SYLVIA MAHACH-WATKINS brings this cause of

action to redress the deprivation, under color of statute, ordinance, regulation, policy, custom, practice or usage of rights, privileges, and immunities secured to SYLVIA MAHACH-WATKINS by the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and the Constitution and laws of the State of California.

[15] 66. At all times herein mentioned, the defendant, STATE OF CALIFORNIA employed the individual Defendants herein and in particular, Defendant DEPEE. Said Defendant provided its individual Defendant DEPEE, employees and agents with official badges and identification cards that designated and described the bearers as employees of the STATE OF CALIFORNIA.

67. During all times herein mentioned, the Defendants, and each of them, separately and in concert, acted under color and pretense of law, under color of the statutes, ordinances, regulations, policies, practices, customs and usages of the State of California. Each of the Defendants herein, separately and in concert deprived SYLVIA MAHACH-WATKINS, and DECEDENT of the rights, privileges and immunities secured to them by the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and the laws of the United States and the Constitution and laws of the State of California.

68. Plaintiff is informed and believes, and thereon alleges that on or about December 9, 2003,

Defendants fatally assaulted, battered, shot and killed DECEDENT as previously described, all of which constituted deadly, excessive, unjustifiable, and unreasonable force in violation of his constitutional right to be free from unreasonable force in violation of his constitutional right to be free from unreasonable searches and seizures, and his due process rights to be free from arbitrary-deprivations of life, liberty, property or the pursuit of happiness. By causing the death of DECEDENT these actions additionally violated SYLVIA MAHACH-WATKINS' right to substantive due process, their rights to privacy, to associate with their son/brother, to cohabitate with their son/brother, to enjoy the care, companionship of her son and to be free from arbitrary and unreasonable government intrusions into the family unit. The above-alleged conduct was done with deliberate indifference and/or intentionally by the shooting officer, Defendant DEPEE.

69. Plaintiff is informed and believes and thereon alleges that Defendants, and each of them, thereafter willfully and intentionally undertook to protect their fellow officer involved in the shooting from civil and criminal liability by falsifying, distorting and covering up the true facts of the death of DECEDENT in violation of Plaintiff's constitutional rights. These facts include but are not limited to:

(a) Halting and interfering with the Del Norte County's investigation into the matter;

[16] (b) Removing the Del Norte County Coroner from the scene of the investigation;

(c) The altering of evidence at the scene of the shooting of DECEDENT;

(d) Giving false statements regarding the circumstances of the shooting and intentionally and willfully refraining from collecting and recording other evidence at or near the scene of the shooting; and refusing to reveal and turn over evidence which would show that DECEDENT had not committed any wrong justifying the actions of the above-mentioned defendants causing his death;

(e) Failing to promptly obtain, preserve and test urine samples from the officer involved in the shooting;

(f) Moving and removing, and failing to collect physical evidence at the scene;

(g) Intimidating and misleading civilian and police witnesses;

(h) Permitting and encouraging officers involved in misconduct to conspire together before giving official statements regarding the circumstances of their conduct;

By so doing, Defendants have intentionally interfered with Plaintiff'ss [sic] right of meaningful access to courts, protected by the United States Constitution.

70. The facts alleged above are part of the customs, practices, policies and decisions of Defendant STATE OF CALIFORNIA, which include, but are not limited to the following:

(a) Using grossly excessive force on citizens;

(b) Falsifying, distorting, and/or covering up the criminal and/or wrongful activities of fellow law enforcement officers by false reporting, false investigating, perjury and dishonesty, in violation of the rights and privileges of Plaintiff and other civilian citizens;

(c) Inadequately and/or fraudulently investigating allegations of misconduct by fellow law enforcement officers, including the use of excessive force in order to cover up and protect fellow officers from disciplinary, criminal and civil actions in violation of Plaintiff and other citizens' right and privileges to meaningful access to the courts as provided by the United States Constitution.

[17] (d) Refusing to supervise, reprimand, and/or discipline law enforcement officers who engage in misconduct contrary to the laws, rules and regulations, thus condoning the use of excessive force and the conducting of unlawful searches and seizures by officers, deputies and agents;

(e) Intimidating, ostracizing and threatening citizens and other law enforcement

officers who report acts of police misconduct;

(f) Refusing to undertake discovery of fellow law enforcement officers' misconduct or inadequately and impartially investigating the same;

(g) Failing to enforce the laws, rules, regulations and procedures when an investigation is conducted of a fellow law enforcement officer, and thereby denying Plaintiff and similarly situated citizens equal protection of the laws and meaningful access to the courts as provided by the United States Constitution;

(h) Inadequately training and supervising employees of the governmental entity, Defendants herein, with respect to the apprehension of suspects, the existence of probable cause, the proper use of force, and the investigation of police misconduct;

(i) Choosing a policy which fails to implement procedures and policies to ensure that law enforcement officers impartially investigate police misconduct, including criminal misconduct, on the part of its officers, deputies and agents;

(j) Tacitly approving of law enforcement officers using the power and position to interfere with civilian citizens' rights, including the right to be free from unreasonable searches and seizures, the

right to be free from arbitrary governmental intrusions into their family unit, their right to enjoy security in the persons, houses, papers and effects against unreasonable searches and seizures, and not to be arrested and/or subject to deadly force without reasonable justification and probable cause.

(k) Condoning racist attitudes and conduct motivated by racial animus within the California Highway Patrol Department against American Indians with respect to the use of policy authority, and in particular, the use of force and deadly force resulting in [18] more force being used against American Indians than other similarly situated citizens and resulting in the violation of their Constitutional rights.

71. The above acts or omissions of the Defendants were undertaken while under color of State law and resulted in the violation of SYLVIA MAHACH-WATKINS and DECEDENT's constitutional rights, as stated herein. Likewise, the customs, practices, policies, and decisions of the STATE OF CALIFORNIA alleged herein and as applied to SYLVIA MAHACH-WATKINS and DECEDENT, resulted in violation of SYLVIA MAHACH-WATKINS and DECEDENT's constitutional rights.

72. The above acts, omissions, customs, practices and/or decisions of the STATE OF CALIFORNIA, while carried out under color of law, have

no justification or excuse in law, and instead constitute a gross abuse of governmental authority and power, shock the conscious, are fundamentally unfair, arbitrary, and oppressive and unrelated to any activity in which governmental officers may appropriately and legally undertake in the course of protecting persons or property, or ensuring civil order. The above acts, omissions, decisions, customs, practices or policies were consciously chosen from among various alternatives.

73. Despite the fact that the STATE OF CALIFORNIA knew or should have known these omissions, decisions, practices, customs and policies, both formal and informal, were being carried out by its agents and employees, the STATE OF CALIFORNIA has taken no steps or efforts to order a halt to this course of conduct, to make redress to these [sic] Plaintiff or other civilian citizens injured thereby, and has failed to take any disciplinary action whatsoever against any of its employees or agents. As such, the STATE OF CALIFORNIA has ratified the wrongful conduct and custom resulting in violations of Plaintiff [sic] civil rights.

74. Plaintiff has a substantive right to access to courts as protected by the First Amendment right to petition. Plaintiff has a right to present to the judiciary allegations concerning violations of fundamental constitutional rights as protected by the Due Process Clause of the Fifth and Fourteenth Amendment without interference from governmental authorities. Plaintiff has a constitutionally-protected

right to institute a wrongful death suit in courts for the death of their loved one, without interference from governmental authorities. Plaintiff has a liberty interest in [19] being free from abusive governmental action and in being accorded procedural and substantive due process of law. Plaintiff has a property interest in recovering for the wrongful death of their loved one and the violation of their constitutional rights. Plaintiff also has a liberty interest in maintaining their personal integrity, dignity, reputation and honor as family members and citizens and not be deprived of her right of association with the DECEDENT. Plaintiff's DECEDENT had a liberty interest to life and the right no [sic] to be deprived of liberty or property without due process of law. Plaintiff's DECEDENT had the right to be free from unreasonable searches and seizures, the right to be free from punishment absent criminal conviction, and the right to be free from the use of unreasonable and excessive force. All of these rights and privileges are secured to Plaintiff and her DECEDENT by the provisions of the First Amendment, Fourth Amendment and the Due Process Clause of the Fifth and Fourteenth

75. Defendants, and each of them, acted in concert and without authorization of law and each of the individual Defendants, separately and in concert, acted willfully, knowingly, with reckless disregard and callous indifference, and purposefully with the intent to deprive Plaintiff and her DECEDENT of their rights and privileges, and did in fact violate the

aforementioned rights and privileges in an amount to be proven at time of trial of this matter.

76. As a direct and proximate result of the aforesaid acts, omissions, customs, practices, policies and decisions of the defendants, and each of them, Plaintiff and her DECEDENT have suffered great mental and physical pain, suffering and anguish, fright, nervousness, anxiety, grief, shock, humiliation, indignity, embarrassment, apprehension, the loss of love, comfort, society, solace and support, all to their damage in a sum to be determined at trial. Plaintiff and her DECEDENT have been greatly humiliated and held up to public scorn and derision as a result of the foregoing acts of the Defendants. Additionally, Plaintiff has been forced to incur substantial amounts of attorneys' fees, investigation expenses and other expenses in the vindication of their constitutional rights.

77. Plaintiff is entitled to and hereby demand costs, attorneys fees and expenses pursuant to 42 U.S.C. Section 1988.

* * *

[21] **WHEREFORE** Plaintiff pray [sic] for judgment against Defendants as follows:

1. For burial and funeral related expenses according to proof at trial;

[22] 2. For general damages in an amount to be determined according to proof at trial;

3. For medical and related expenses according to proof at trial;

4. For costs of suit incurred herein;

5. For punitive damages against the individual defendants in an amount to be determined according to proof at trial;

6. For attorneys' fees, investigation fees, and expert witness fees incurred herein; and

7. For such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

DATED: May 1, 2005

LAW OFFICES OF
TORY M. PANKOPF
LAW OFFICES OF
MARY H. BEATIFICATO

BY: /S/ TORY M. PANKOPF
TORY M. PANKOPF
MARY H. BEATIFICATO
Attorneys for Plaintiff

State of California
Board of Control
GOVERNMENT CLAIM
SBOC-GC-0002 (Rev. 6/00)

Please read "Instructions for Filing a Claim"

If you are filing this claim beyond six months from the incident date, please see instructions for filing a late claim application on the opposite page.

G

Section 1: Claimant Information

Name of Claimant	Telephone Number (include area code)
Patricia Ann Watkins (Sister of decedent John Watkins)	(707) 464-7734
Sylvia Mahach-Watkins (Mother of decedent John Watkins)	

Mailing Address	City	State	Zip Code
P.O. Box 2132	Crescent City	CA	95531

Section 2: Claim Information

Is the claim filed on behalf of a minor? ☐ Yes ☒ No
If yes, please indicate: Relationship to the minor _____
Date of birth of the minor _____

Name of State Agency against which this claim is filed	Incident Date	Dollar Amount of Claim
California Highway Patrol	Month 12 Day 10 Yr. 2003	$10,000,000.00

If the amount exceeds $10,000, indicate type of civil case: ☐ Limited Civil Case ☒ Non-Limited Civil Case	Explain how the dollar amount claimed was computed (Attach three copies of the supporting documentation for the amount claimed with this firm.) Wrongful Death: loss of benefits and funeral expenses; present value of future contributions; loss of society and companionship; Int. and Neg. of Emotional Distress . . .
Describe the specific damage or injury incurred as a result of the incident Shot and killed while unarmed.	
	Location of the incident (if applicable, include street address, city or county, highway number, postmile number and direction of travel) Crescent City, California; S. Hwy 101
	Preferred Hearing Location (if an appearance is necessary) ☒ Sacramento ☐ Los Angeles ☐ Oakland ☐ San Diego

Explain the circumstances that led to the alleged damage or injury. State all facts that support your claim against the State of California, and why you believe the State is responsible for the alleged damage, or injury. If known, provide the name(s) of the State employee(s) who allegedly caused the injury,

damage or loss. (If more space is needed, please attach additional sheets.)

Decedent was riding his bicycle home. Decedent was pulled over by the CHP. Decedent was unarmed. He did not carry a knife or a gun when he was stopped. He was not carrying contraband. For reasons unknown to the claimant at this time, the lone CHP officer responsible for shooting and killing decedent alleges through representatives of the CHP to the local newspaper that the decedent threw his bicycle at the patrol car and fled on foot. The officer pursued, overtook and tackled the decedent to the ground. A struggle insued [sic]. It is alleged that the decedent came to have the officer's flashlight and threatened the officer with it. At such time, the officer decided it was necessary to use deadly force and withdrew his firearm from his holster and discharged his weapon with the intent to kill the decedent. After being shot, the decedent ran a little further into the woods, collapsed, and died by suffocating on his own blood. Because the decedent was unarmed, the officer's decision to use deadly force was unjustified and not within the department's policy and procedure.

State of California
Board of Control
GOVERNMENT CLAIM
SBOC-GC-0002 (Rev. 6/00)
Reverse

Submit completed claim form and three copies to:
STATE BOARD OF CONTROL
GOVERNMENT CLAIMS BRANCH
P.O. Box 3035
Sacramento, CA 95812-3035

Section 3: Insurance Information			
Has the claim for the alleged damage/injury been filed or will it be filed with your insurance carrier? ☐ Yes ☐ No	Policy Number	Telephone number (include area code) ( )	
Mailing Address	City	State	Zip Code
Name of Insurance carrier	Amount of Deductible $		
Are you the registered owner? ☐ Yes ☐ No Make: ____ Model: ____ Year: ____			
Section 4: FOR STATE AGENCY USE ONLY (must be completed by a State agency representative)			
Name of State agency	Badge Act Appropriation or Item Number and the appropriate Schedule if applicable		
	Name of fund or account		
Name of agency budget office representative	Title	CALNET Number	

Signature of agency budget representative	Date

Section 5: Representative Information
(must be completed if claim is being filed by an attorney or authorized representative)

Name of Attorney/ Representative	Telephone Number (include area code)		
Tory M. Pankopf, C.S.B. #202581	(775) 831-0326		
Mailing Address	**City**	**State**	**Zip**
341 Ski Way, #103	Incline Village	NV	89451

Section 6: Notice and Signature

Section 72 of the Penal Code provides that "every person who, with intent to defraud, presents for allowance or for payment to any State Board or Office, or to any county, town, city, district, ward, or village, board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or written, is guilty of a felony."

Signature of Claimant	Date
	May 14, 2003
Signature of Attorney/Representative	Date
Tory M. Pankopf	

APPENDIX E

08-15694

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff-Appellee,

v.

LARRY DEPEE, a California Highway Patrol Officer,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 3:05-cv-01143-SI
The Honorable Susan Illston, Judge

EXCERPTS OF RECORD

VOLUME III

* * *

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS, Plaintiff, v. **LARRY DEPEE, STATE OF CALIFORNIA,** Defendants.	CASE NO. C-05-1143-SI **VERDICT FORM – DAMAGES** (Filed Aug. 9, 2007)

We, the jury in the above-entitled action, unanimously find the following special verdict on the questions submitted to us:

CLAIM I

As to plaintiff Sylvia Mahach-Watkins's first claim for violation of the Fourth Amendment rights of her son John Watkins, what do you find to be the total amount of the compensatory damages, if any, caused by defendant Larry Depee?

No Damages _____ [mark an X]

Nominal Damages __1__ [enter an amount not to exceed one dollar]

[2] As to plaintiff Sylvia Mahach-Watkins's first claim for violation of the Fourth Amendment rights of

her son John Watkins, do you find that defendant Larry Depee's conduct was malicious, oppressive, or in reckless disregard of John Watkins's rights justifying an award of punitive damages?

Yes _____

No ___X___

CLAIM 3

As to plaintiff Sylvia Mahach-Watkins's wrongful death claim against defendant Larry Depee for committing a battery causing the death of John Watkins, what do you find to be the total amount of her compensatory damages, if any, caused by defendant Larry Depee?

No Damages _____ [mark an X]

Nominal Damages ___1___ [enter an amount not to exceed one dollar]

Damages _____ [enter a dollar amount]

As to plaintiff Sylvia Mahach-Watkins's wrongful death claim against defendant Larry Depee for commission of a battery causing the death of John Watkins, do you find that defendant Larry Depee's conduct was malicious, oppressive, or in reckless disregard of John Watkins's rights justifying an award of punitive damages?

Yes _____

No ___X___

If you find that defendant Larry Depee's conduct was malicious, oppressive, or in reckless disregard of

John Watkins's rights as to either Claim One or Claim Three (you answered "Yes" above as to either claim), what do you find to be the amount of the punitive damages you award?

___0___ [enter a dollar amount]

[3] Please have the presiding juror sign and date this form.

DATE: August _8_, 2007

/s/ [signed by]
PRESIDING JUROR

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff,

v.

LARRY DEPEE, et al.,

Defendants.
/

No. C 05-1143 SI

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL NEW TRIAL ON DAMAGES

(Filed Oct. 31, 2007)

Plaintiff's motion for a partial new trial on damages is scheduled for a hearing on November 2, 2007. Pursuant to Civil Local Rule 7-1(b), the Court determines that the matter is appropriate for resolution without oral argument, and VACATES the hearing. For the reasons set forth below, the Court DENIES plaintiff's motion.

LEGAL STANDARD

Rule 59(a) states, "A new trial may be granted . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a)(1). The Ninth Circuit has noted, "Rule 59 does not specify the grounds on which a motion for a new trial may be granted." *Lang v. Am. Gem Seafoods,* Inc., 339 F.3d

1020, 1035 (9th Cir. 2003). Rather, courts are "bound by those grounds that have been historically recognized." *Id.* The Ninth Circuit has held that "[t]he trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 510 n. 15 (9th Cir. 2000). The authority to grant a new trial under Rule 59 "is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chem. Corp. v. Daiflon*, 449 U.S. 33, 36 (1980) (per curiam); *see Vickery v. Fisher Governor Co.*, 417 F.2d 466, 470 (9th Cir. 1969) (trial court has "wide judicial discretion" in considering new trial motion).

DISCUSSION

Plaintiff sued defendants after California Highway Patrol Officer Larry Depee shot and killed her son John Watkins in the course of a late-night encounter in Crescent City, California. The three week jury trial was bifurcated. On liability, the jury returned a mixed verdict: the jury found that defendant Depee violated John's Fourth Amendment rights (42 U.S.C. § 1983) and caused a battery to John (state law wrongful death claim), but found against plaintiff on her own Fourteenth Amendment claim. In the damages phase, the jury awarded nominal damages of $1 on the § 1983 Fourth Amendment claim and $1 on the battery claim. The jury did not award punitive damages.

Plaintiff now moves for a partial new trial, as to damages only, on the following grounds: (1) that the Court improperly admitted evidence regarding John's mental health and criminal history during the damages phase; (2) that the damages verdict is against the clear weight of evidence; and (3) that the Court gave an allegedly erroneous damage instruction on the § 1983 Fourth Amendment claim. The Court finds that none of these asserted grounds warrants a new trial.

1. Evidence of John's mental health and criminal history

During the damages phase, defendants put on evidence showing, *inter alia*, that John Watkins had schizophrenia and a history of substance abuse, and that he had a lengthy criminal history. The evidence also showed that plaintiff and her son had a troubled relationship, and that John had threatened or acted violently toward his mother and others in the past.

"A new trial is only warranted when an erroneous evidentiary ruling substantially prejudiced a party." *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1328 (9th Cir. 1995) (internal quotation and citation omitted). Here, evidence of John's mental health and criminal history was relevant to the nature and degree of emotional comfort and companionship that

plaintiff had received from her son.[1] *See Gates v. Rivera*, 993 F.2d 697, 700 (9th Cir. 1993) (stating in § 1983 wrongful death case brought by mother that "[r]estricted to the issue of damages, the questions as to [decedent son's] use of drugs were proper, and the district court had discretion to admit them as probative and not unduly prejudicial.").

2. Damages verdict

Plaintiff generally asserts that the damages verdict is not supported by the evidence, and that the nominal damages awarded constitute a miscarriage of justice. Plaintiff does not discuss any of the specific evidence adduced at trial, nor does plaintiff articulate how the damages award is contrary to the clear weight of the evidence.

The Court acknowledges the deep pain and loss that plaintiff has felt as a result of the death of her son. The Court is also sympathetic to plaintiff's argument that no individual's life is worth only one dollar. However, the Court cannot conclude that the damages award – which was for plaintiff's loss of John's care, comfort and companionship – is contrary to the clear weight of the evidence. Plaintiff was the only person to testify in support of her damages claim. Plaintiff testified, *inter alia*, that she and her

---

[1] Such evidence was also relevant to plaintiff's claim for damages for the loss of John's financial support; plaintiff abandoned that claim on the last day of trial.

son loved each other and had a close relationship. However, defendants painted a more complicated picture of the relationship; defendants' evidence showed that John had threatened plaintiff on several occasions, that plaintiff was afraid of him and periodically requested police assistance with him, that John had difficulty forming any meaningful relationships, and that John had a serious history of poorly-managed psychiatric instability. On this record, the Court cannot set aside the jury's damages verdict as against the weight of the evidence.[2]

3. 42 U.S.C. § 1983 nominal damages jury instruction

The jury was instructed that "[u]nder the Section 1983 claim, you must award nominal damages of no more than one dollar." As to the state law wrongful death claim, the jury was instructed that it could award compensatory damages for "loss of John Watkins' love, companionship, comfort, care, assistance, protection, affection, society, and moral support," as

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[2] To the extent plaintiff contends that as a matter of law nominal damages can never be awarded in a wrongful death case, the Court disagrees. *See, e.g., Wilson v. City and County of San Francisco*, 106 Cal. App. 2d 440, 444 (1951) (stating that in wrongful death cases, "[c]ollateral heirs must prove their pecuniary loss or their recovery will be limited to nominal damages."); *see also Robison v. Leigh*, 153 Cal. App. 2d 730, 733-34 (1957) ("Four of the sisters had been completely out of touch with decedent for many years and we agree with appellant that their damages, if any, were purely nominal.")

well as punitive damages.[3] The jury awarded $1 on each claim.

Plaintiff contends that the Section 1983 damages instruction was erroneous, and that the jury should have been instructed that it could also award compensatory damages under Section 1983. The parties submitted competing instructions regarding the damages available under plaintiff's Section 1983 claim on behalf of the decedent for a violation of the decedent's Fourth Amendment rights. Plaintiff sought recovery for, *inter alia*, the loss of enjoyment of life and the pain and suffering experienced by her son prior to his death. The Ninth Circuit has not addressed the question of what damages are available under a Section 1983 wrongful death claim. After consideration of the parties' briefing, the Court concluded that the damages available under the Section 1983 excessive

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[3] The "Compensatory State Law Wrongful Death Damages" instruction stated, *inter alia*, that plaintiff,

> "claims damages for the loss of John Watkins' love, companionship, comfort, care, assistance, protection, affection, society, and moral support No fixed standard exists for deciding the amount of such damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.
>
> In determining plaintiff Sylvia Mahach-Watkins' loss, do not consider:
>
> 1. The plaintiff's grief, sorrow, or mental anguish.
> 2. John Watkins' pain and suffering; or
> 3. The poverty or wealth of the plaintiff."

force/wrongful death claim are those set forth in California's survival statute, Cal. Code Civ. Proc. § 377.34. *See generally Venerable v. City of Sacramento*, 185 F.Supp.2d 1128, 1131-33 (E.D.Cal. 2002). California's survival statute does not allow recovery for the decedent's loss of enjoyment of life, or the decedent's pain and suffering, and thus the Court's Section 1983 instruction did not include those damages. The Court finds no error in the instruction that was given.

CONCLUSION

For the foregoing reasons, the Court DENIES plaintiff's motion for a partial new trial. (Docket No. 202).

IT IS SO ORDERED.

Dated: October 31, 2007 /s/ Susan Illston
SUSAN ILLSTON
United States
District Judge

APPENDIX F

08-15694

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff-Appellee,

v.

LARRY DEPEE, a California Highway Patrol Officer,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 3:05-cv-01143-SI
The Honorable Susan Illston, Judge

APPELLANT'S SUPPLEMENTAL EXCERPTS OF RECORD

VOLUME IV

* * *

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS, Plaintiff, **v.** **LARRY DEPEE, STATE OF CALIFORNIA, and DOES 1 through 100, Inclusive,** Defendants.	CASE NO. C-05-1143-SI **JOINT PRETRIAL CONFERENCE STATEMENT** Date: May 15, 2007 Time: 3:30 p.m. Court: Courtroom 10 Judge: Hon. Susan Illston TRIAL DATE: May 29, 2007

[2] This Joint Pretrial Conference Statement is filed pursuant to Federal Rule of Civil Procedure 16 and the Court's Pretrial Instructions:

(1) THE ACTION:

(A) Substance of the Action:

This is a civil rights and state wrongful death lawsuit arising from the shooting death of the plaintiff's son, John Watkins, by California Highway Patrol ("CHP") Officer Larry Depee on December 9, 2003. The plaintiff is Sylvia Mahach-Watkins, suing on her own behalf and on behalf of the Estate of John Watkins. The defendants are Larry Depee and his employer, the State of California.

The plaintiff's claims are as follows:

The First Amended Complaint: The operative complaint in this matter is the First Amended Complaint. However, pursuant to this Court's rulings on Defendants' Motion to Dismiss and Motion for Summary Judgment, the only causes of action which remain are Plaintiff's First Cause of Action (Wrongful Death based upon assault, battery and negligence), and her Sixth Cause of Action (Section 1983 Civil Rights Violations).

The defendants assert the following defenses:

Defendants claim that Officer Depee is entitled to qualified immunity on the plaintiff's § 1983 cause of action. Defendants maintain Officer Depee shot John Watkins in self-defense and that his use of deadly force was reasonable and justified under the circumstances. Defendants also maintain that plaintiff's state claims are barred by state law immunity principles, namely California Penal Code section 196 and Government Code section 820.2.

(B) <u>Relief Prayed</u>:

The plaintiff seeks the following damages and will present the following evidence concerning the amount of these damages:

i. *State Wrongful Death Claims.* Pursuant to *California Code of Civil Procedure* §377.61, Ms. Mahach-Watkins is entitled to damages which "under all circumstances of the case, may be just . . . " This

includes (1) the present value of future contributions from the decedent to Plaintiff, (2) the value of any personal service, advice or training that probably would have been [3] given; and (3) the value of the decedent's society and companionship. Plaintiff will testify at trial as to the value of contributions from Decedent as well as to the nature of her relationship with Decedent.

ii. *Pursuant to California Civil Code* §3294, Ms. Mahach-Watkins is entitled to punitive damages on all state claims.

iii. *Section 1983 Civil Rights Violations.* As to all of Plaintiff's civil rights claims, Plaintiff is entitled to (1) special damages including medical expenses and loss of income, (2) general damages, (3) punitive damages and (4) attorney fees and costs. As to special damages, Plaintiff will testify as to the nature and extent of these damages. Further, Plaintiff's retained expert, Dr. Kris Sperry, will testify as to the pain and suffering experienced by Decedent during the time that he was shot and the time that he died.

The defendants will present the following evidence concerning damages:

1. Expert testimony by John S. MacGregor, M.D., a cardiologist, to rebut plaintiff's claim that her heart attack was causally related to the shooting death of her son, John Watkins, and testimony about plaintiff's health problems.

2. Expert testimony by Bruce Victor, M.D., a psychiatrist, to rebut plaintiff's claims of emotional distress, and to establish John Watkins's level of functioning and his psychiatric prognosis had he lived.

3. Expert testimony by Richard T. Mason, M.D., a forensic pathologist, about John Watkins's life expectancy had he survived.

4. Documentary evidence such as medical, psychiatric, and criminal history records of decedent John Watkins to establish his level of functioning, earning potential, physical and mental health, and life expectancy, as well as medical and psychiatric records about plaintiff's own health and life expectancy.

(2) FACTUAL BASIS OF THE ACTION:

(A) Undisputed Facts:

Plaintiff Sylvia Mahach-Watkins was the natural mother of decedent John Watkins. John Watkins was shot by defendant CHP Officer Larry Depee on December 9, 2003 and died as

* * *

[10] 4. Pain and Suffering and Punitive Damages re Civil Rights Violations

The California survival statute, insofar as it excludes recovery for pain and suffering, is inconsistent with section 1983. *Guyton v. Phillips*, 532

F.Supp. 1154, 1166 (D.C.Cal, 1981). Its restrictions on recovery are significantly inhospitable to the policies fostered by the Act. *Id.* To deny recovery for pain and suffering would strike at the very heart of a section 1983 action. *Id.* Had the victim survived, he could have recovered, among other things, loss of earnings and pain and suffering. *Id.* The inescapable conclusion is that there may be substantial deterrent effect to conduct that results in the injury of an individual but virtually no deterrent to conduct that kills its victim. *Id.*

The remedy in a survival action, brought by the estate of the deceased victim, in accord with section 1983's express statement that the liability is "to the party injured." 42 U.S.C. § 1983. *Berry v. City of Muskogee, Okl.*, 900 P.2d 1489, 1507, C.A.10 (Okl.), 1990. It must make available to plaintiffs sufficient damages to serve the deterrent function central to the purpose of section 1983. *Id.* Appropriate compensatory damages include medical and burial expenses, pain and suffering before death, loss of earnings based upon the probable duration of the victim's life had not the injury occurred, the victim's loss of consortium, and other damages recognized in common law tort actions. *Id.* The state wrongful death actions are not foreclosed by this approach; they remain as pendent state claims. *Id.*

5. Lawful Resistance.

Penal Code § 692 provides that lawful resistance to the commission of a public offense may be made by the party about to be injured or by other parties.

Defendants' Contentions:

1. Under the U.S. Constitution, a peace officer may use deadly force if he reasonably believes, under all the circumstances known to the officer at the time, that such force is necessary to protect himself or others from death or serious physical harm. *Tennessee v.*

* * *

[45] **(D) Bifurcation, Separate Trial of Issues:**

Plaintiff desires that the issues of liability and damages be bifurcated and contends that it is feasible. Defendants will oppose bifurcation.

Dated: May 1, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the
State of California
TYLER B. PON
Supervising Deputy Attorney
General
S. MICHELE INAN
Deputy Attorney General

/s/
DAVID W. HAMILTON
Deputy Attorney General

Attorneys for Defendants
State of California and
Larry Depee

/s/
TORY M. PANKOPF
MARY HELEN BEATIFICATO

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor In Interest to the Estate of JOHN JOSPEH [sic] WAYNE WATKINS, Plaintiffs, v. LARRY DEPEE, STATE OF CALIFORNIA, and DOES 1 through 100, Inclusive, Defendants.	Case No. C-05-1143-SI [The Honorable Susan Illston] **PLAINTIFF'S PROPOSED SEPARATE JURY INSTRUCTIONS** **Pre-Trial Conference:** DATE: May 15, 2007 TIME: 3:30 P.M. ROOM: 10, 19th Floor

Pursuant to FRCP Rule 51, PLAINTIFF, SYLVIA MAHACH-WATKINS, respectfully submits her proposed separate jury instructions and requests the Court give the instructions to the jury:

* * *

[10] F.

MEASURES OF TYPES OF DAMAGES

In determining the measure of damages, you should consider:

The nature and extent of the injuries;

The loss of enjoyment of life experienced and which with reasonable probability will be experienced in the future;

The mental, physical, emotional pain and suffering experienced by John Watkins prior to his death;

The reasonable value of disability income lost to the present time;

The reasonable value of disability income which with reasonable probability will be lost in the future;

The reasonable value of necessary household help] [services other than medical] [and] [expenses] [_____] required to the present time;]

[The reasonable value of necessary [household help] [services other than medical] [and] [expenses] [_____] which with reasonable probability will be required in the future;]

[and]

GIVEN: _____
MODIFIED: _____
REFUSED: _____
WITHDRAWN: _____

Authority: Manual of Model Civil Jury Instructions for the Ninth Circuit; 2007 Edition Instruction No. 5.2

* * *

[39] DATED: May 5, 2007

BEATIFICATO & ASSOCIATES

BY: /S/ MARY H. BEATIFICATO
MARY H. BEATIFICATO,
Attorneys for Plaintiff,
SYLVIA MAHACH-WATKINS

DATED: May 5, 2007

LAW OFFICES OF TORY PANKOPF

BY: /S/ Tory M. Pankopf
TORY M. PANKOPF
Attorneys for Plaintiff,
SYLVIA MAHACH-WATKINS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor In Interest to the Estate of JOHN JOSPEH [sic] WAYNE WATKINS, Plaintiffs, v. LARRY DEPEE, STATE OF CALIFORNIA, and DOES 1 through 100, Inclusive, Defendants.	Case No. C-05-1143-SI [The Honorable Susan Illston] **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE IRRELEVANT AND PREJUDICIAL EVIDENCE OF DAMAGES** PreTrial Conference: DATE: May 15, 2007 TIME: 3:30 P.M. JUDGE: Hon. Susan Illston Trial Date: May 29, 2007

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Plaintiff, SYLVIA MAHACH WATKINS hereby submits the following opposition to Defendants' Motion in Limine to Exclude Irrelevant and Prejudicial Evidence of Damages (hereinafter "Motion").

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

This is a civil rights and wrongful death lawsuit arising from the shooting death of John Watkins by California Highway Patrol ("CHP") Officer Larry Depee on December 9, 2003. Defendant Larry Depee, used excessive and deadly force to make a safety stop to advise John Watkins to get a light for his bicycle and not to ride his bicycle southbound in the northbound lane of the "S" curves while cutting across to the southbound lane. After using his patrol car to stop John on his bicycle, Defendant Depee chased John into heavy brush and then shot and killed him while he was on the ground and some distance from Defendant Depee and his gun.

Plaintiff Sylvia Mahach-Watkins is the mother of John Watkins and brings this civil rights and wrongful death action on behalf of her deceased son and herself. The defendants are Larry Depee and the State of California.

* * *

[3] C. Pain and Suffering by Decedent Prior to Death (Section 1983 Claim)

Defendants contend that Plaintiff is not entitled to recover the pain and suffering experienced by John Watkins prior to his death. The Northern and Central Districts of California disagrees with the Defendants contention. *Guyton v. Phillips*, 532 F.Supp. 1154, 1166

(D.C.Cal, 1981); *Garcia v. Whitehead*, 961 F.Supp. 230, 233 (C.D. Cal. 1997).

The California survival statute, insofar as it excludes recovery for pain and suffering, is inconsistent with section 1983. *Guyton* @ 1166. Its restrictions on recovery are significantly inhospitable to the policies fostered by the Act. *Id.* To deny recovery for pain and suffering would strike at the very heart of a section 1983 action. *Id.* Had the victim survived, he could have recovered, among other things, loss of earnings and pain and suffering. *Id.* The inescapable conclusion is that there may be substantial deterrent effect to conduct that results in the injury of an individual but virtually no deterrent to conduct that kills its victim. *Id.*

The remedy in a survival action, brought by the estate of the deceased victim, in accord with section 1983's express statement that the liability is "to the party injured." 42 U.S.C. §1983. *Berry v. City of Muskogee, Okl.*, 900 F.2d 1489, 1507, C.A.10 (Okl.), 1990. It must make, available to plaintiffs sufficient damages to serve the deterrent function central to the purpose of section 1983. *Id.* Appropriate compensatory damages include medical and burial expenses, pain and suffering before death, loss of earnings based upon the probable duration of the victim's life had not the injury occurred, the victim's loss of consortium, and other damages recognized in common law tort actions. *Id.* The state wrongful death actions are not foreclosed by this approach; they remain as pendent state claims. *Id.*

Because California's survival statute excludes recovery for pain and suffering it is inconsistent with Section 1983. Thus, John's pain and suffering is recoverable under his Section 1983 claim.

II. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendants Motion except for evidence regarding Plaintiff's financial condition or needs.

DATED: May 8, 2007

BY: /S/ Tory M. Pankopf
TORY M. PANKOPF
MARY H. BEATIFICATO
Attorneys for Plaintiff,
Sylvia Mahach-Watkins

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SUSAN ILLSTON

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS, Plaintiffs, VS. LARRY DEPEE, STATE OF CALIFORNIA, and DOES 1 through 100, Inclusive, Defendants.	**Certified Copy** NO. C 05-01143-SI San Francisco, California Thursday August 9, 2007 8:30 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff: BEATIFICATO & ASSOCIATES
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BY: TORY M. PANKOPF

(Appearances continued on next page)

Reported By: **Lydia Zinn, CSR #9223, RPR**
Official Reporter –
U.S. District Court

* * *

[10] MS. BEATIFICATO: That was our brief.

MR. PANKOPF: That was from us.

THE COURT: I got a verdict form.

MR. HAMILTON: You get [sic] a verdict form? Maybe my secretary came in early. I don't know. She's very good.

MS. BEATIFICATO: The general damages aren't included on Claim 1. I read the Court's order.

THE COURT: Right. Well, and I think we'll have to – we'll have to revise this, because at this point, I don't see any distinction between Claim 1 and Claim 3, so I don't think we need to get them to separate that out, because the measure is the same.

MR. HAMILTON: Well, your Honor, I think – I think this is – the reason we put it in there is because we have a finding on the three claims. And the only civil rights claim on which there is a finding in plaintiff's favor is Claim 1. And if they had – already they have no compensatory damages. they have no damages at all. The only way –

THE COURT: Well, they – that's not true. Did you read the instructions that I sent out?

I ruled that the – I agree with the defendants that you can't get pain and suffering and predeath pain and suffering for Mr. Watkins. You can't get that.

However, I also ruled that the measure under that 1983 is the same as the measure under a wrongful death state [11] claim.

MR. HAMILTON: I thought that yesterday when we had this discussion after court, that the Court said – and we all agreed; there was no opposition, I thought – that the only damages available to them under line 1 was either punitive or –

THE COURT: Well, I have been thinking about that, but in reviewing what Judge Chesney said and what some of the other cases have said her conclusion was – and the other case's conclusion is – that if there's nothing except punitive damages, effectively, then it would not serve the deterrent purposes that 1983 is meant to serve. So it could be true to the survivorship statute in California – I mean, consistent with that, to allow the traditional wrongful death measure of damages in a 1983, but not the predeath pain and suffering, and that would not survive. And since in this case you have both claims, it seems to me a perfect situation for simply providing that one instruction.

MR. HAMILTON: Your Honor, this is a complete surprise to us.

THE COURT: I said it to you last night. I filed it.

MR. HAMILTON: Your Honor, I got – you filed it last night, and I think I got it at 5:00 o'clock, when I got back to my office.

That is a very important issue. Shouldn't we have a [12] chance to brief that issue? You cited one unpublished case. And the first time I got it was when you filed it last night. I think we should have a chance to brief that issue.

THE COURT: If it's wrong, it's wrong. It's also part of this case. You have two claims against the same folks for the same amount of damages. So it's going to make absolutely no difference.

MR. HAMILTON: As you know, civil rights cases – it will make a large difference. The proverbial tail wagging the dog is attorneys' fees.

THE COURT: I don't think this jury could say zero, if that's your question on 1983, because the nominal damage instruction says if you find no damages, then you should find nominal damages, which is 1 dollar. And there's still a tail on that.

MR. HAMILTON: According to basic Supreme Court authority within the last few years, if you get nothing but nominal damages, you're not entitled to attorneys' fees. We need to separate out the –

THE COURT: I see what you're saying, but I'm still going to give the same measure. And we'll have preserved for whatever you want the question of

whether that's the right way to measure it, but that's – I'm just going to give them the one standard.

MS. BEATIFICATO: Your Honor, my only concern is [13] this. If we separate them out – Claim 1 and Claim 3 – there needs to be something in the verdict form that expresses the jury's intent that – for example, let's say they award a dollar on – $2 on the Claim 1. And they also awarded $2 on Claim 3. They may intend for that to be in addition to what they awarded on Claim 1, rather than the same identical amount.

Does the Court follow?

THE COURT: The Court does not.

MS. BEATIFICATO: The jury could find that they want to award for Mr. Watkins' Fourth Amendment violation $2. And so they would write in, under Claim 1, $2. for those general damages.

And then they could also find separately that, as to Ms. Mahach's wrongful-death claim, that they want to award her $2. I say $2 again because it's just the identical amount, but it's their intent that they be in addition to each other.

For example, they intend that as – in the – that generally, they want to award $4; and then they split that $4 up between the two claims: $2 on one claim, and $2 on the other claim If there's a verdict form that makes that intent clear, then an issue may arise after the fact as to, well, what – was it the same amount that they intended to award, or was it the

addition of those two amounts together? And I think there needs to be something to make that clear.

THE COURT: Well, the measure is the same on both. [14] And it would not be – it was not intended to be – it would be incorrect to add them. So somehow, some way, we can make that – make that clear. I'm not at all sure that we need to have two – two lines.

MR. HAMILTON: Your Honor, I think we're making a huge mistake in doing this. Let me tell you why, without any additional briefing.

Wrongful death is a cause of action that belongs only to the – to Ms. Mahach for her own losses.

The damages in the Casey instruction that the Court has adopted, you know, go to care, comfort, and society. Those are her damages.

A survivor claim, which is the only thing that was at issue in the Fourth Amendment claim, is the decedent's loss, totally separate from the plaintiff's loss.

Then – so the only damages to be proved there, if pain and suffering is out, which the Court has ruled, would be did he suffer – did he have any medical injuries during the time that he survived?

Now, you know, he only lived 15 or 30 minutes. Theoretically, you could have a survivor case where someone would have substantial damages until they had died. Then they could live for years, for example.

So that's a very substantial item of damages in a survivor case.

We don't have that here, but that would be – that is [15] the decedent's damages, and only his damages.

So California law says that the survivor claim, which is what the Fourth Amendment is all about in Claim 1 in this case, is strictly John Watkins' damages. He has no provable damages here. And the Court said yesterday that, you know, it appeared that the only evidence to support any damages for him on Claim 1 is the nominal damages, because there's no proof of pain and suffering, and the law wouldn't allow that anyway. So then he can get nominal damages and punitive damages under the law and under the facts, and that's all. So that claim has got to be separated out. We can't combine Mrs. Watkins' totally separate claim for wrongful-death damages with Claim 1.

MS. BEATIFICATO: Your Honor, I'd like to add in: It makes absolutely no sense. I went home after the Court's discussion yesterday regarding jury instructions, and I was reading through the practice guides on civil rights and civil liberties litigation. And there is – besides that unpublished decision, there's a whole line of cases coming from other circuits. And essentially, it doesn't make sense from a policy stand point that the purpose behind the 1983 statute – that if somebody has their Fourth Amendment rights violated, but it goes so far as to kill them, that all of a sudden now, all of the things that would have been available to them are – had they lived, are no longer

available, so that you can only get something such as nominal damages. It just doesn't make sense. [16] And that's the policy that's reiterated throughout this line of cases, and that your Honor was – was alluding to in this unpublished decision.

MR. HAMILTON: Your Honor, to respond to that, we filed a motion on this, citing the cases that the Court discussed yesterday, many months ago. The Court had read them. Counsel had a chance to respond at that time.

We also raised the issue in the trial brief we filed – same issue. And Counsel never filed anything. And now she's telling us orally she's got cases from other circuits that we haven't even had identified; haven't seen.

The Court had already ruled yesterday that they had looked at the relevant cases cited by the defense, and agreed that the only damages – that pain and suffering is not available, and the only damages that would be available under the evidence would be nominal here, plus punitive. We all went away yesterday thinking that was the case.

Now Counsel, I guess, has a book in front of her, and she's going to tell you: Oh, there's other authority out there. Why didn't she tell the Court about this earlier?

MS. BEATIFICATO: I want to set the record straight. What Mr. Hamilton's referring to – they filed a motion *in limine* regarding the pain and

suffering. And there was an opposition by the Plaintiff. And we filed that opposition. So to say that we're raising this for the first time is just [17] incorrect.

The second thing is we're talking about apples and oranges. There are two different issues here. One is the issue of whether the decedent, or Mrs. Mahach on his behalf, is entitled to pain and suffering from the time that he was shot until the time that he died. That's one issue.

The second issue is what we discussed yesterday, and which the Court's ruling was going to last night – was: Can you get those wrongful-death damages in the 1983 action for the Fourth Amendment violation? That's a separate issue. And that has not been briefed before. So that is incorrect.

And specifically the cases that I was referring to, aside from the unpublished decision that your Honor cited to, is *Robertson versus Wegman*, and also the Frazier decision, which – I was looking for a cite to that, but I think it also supports that proposition as well, It just doesn't make sense for the purpose behind 1983 to say that if the police officer's conduct goes so far that the decedent or that that person dies as a result of their violations of the Fourth Amendment, that all of a sudden, all these damages are not available to them.

MR. HAMILTON: Your Honor, that is exactly what California law's survival statute says. I quoted it in my trial brief on page 26. Plaintiff's survival action may recover only damages, quote.

> Limited to the loss or damage that the [18] decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

That is the statute. That's California law. Talking – we are talking apples and oranges. Claim 1 is an apple. That is John –

THE COURT: Right. I think I disagree with you. I'll take another look at this. I think I disagree with you. So for your planning purposes today, my current plan is to go with the instructions that I provided. And we'll have to see how the verdict form pans out, in order not to be confusing. I will take a look at what you've said, but that's my current plan.

MR. HAMILTON: What verdict form are you planning on using?

THE COURT: What?

MR. HAMILTON: What verdict form –

THE COURT: Well, certainly yours will not work. I'll have to do another one. I'll get it for you, but whether it has two sections or one section is what I'm currently puzzling over; but the one that you'd suggested won't work, because it's inconsistent with what I plan to instruct them, [19] and it – because it's inconsistent with what I planned to instruct them.

MR. HAMILTON: Could I say one more thing?

THE COURT: Sure.

MR. HAMILTON: If you look at the jury instructions we submitted on liability, we broke up the three claims because the Court was convinced – and I think rightly so – that Claim 2 was – was based on Ms. Machach-Watkins' own claim under the Fourteenth Amendment. And that was separate from John Watkins' survivor claim under the Fourth Amendment, which was the subject of Claim 1.

We tried the case. We had the jury deliberate based on those instructions, breaking those claims out. And the final claim was entirely separate under state law for wrongful death.

Again, wrongful death is completely different from those other two claims. It is certainly different from Claim 1, which was only the decedent's Fourth Amendment claim; only his rights; only his interests. Those are totally different from her separate claim under California law, which was tried as Claim 3.

I don't know how we could possibly say that – that the jury should just now mix them all together and give Ms. Mahach-Watkins damages for her own wrongful death, which is care, comfort, society, support, and so on, and just, you know, [20] forget whether the decedent had any separate damages. Those are completely separate damages under the law. And the jury has got – seems to me, has got to

decide them separately here, you know, because the evidence shows there are no damages, unless possibly punitive damages and nominal damages for the decedent. His survivor claim is a completely separate issue from what her damages are.

MS. BEATIFICATO: Your Honor, one more comment I'd like to make for the record. Perhaps a suggestion is that we should separate them out.

I obviously agree with the Court, in that the plaintiff is entitled to – as a successor in interest, to get those compensatory damages for Mr. Watkins himself; but if we separated them out and then perhaps asked a question about whether the jury intended that those – that the damages under Claim 3 be in addition to the damages in Claim 1, for some reason, should there be a problem or the defendant wished to take the issue up on appeal, we don't have to have a retrial of the whole case, because the damages that the jury intended to award under Claim 1 are completely separate, and they can either be kept as is, or stricken.

THE COURT: All right. We'll see.

Now, there was one other thing on witnesses.

MS. BEATIFICATO: Yes.

THE COURT: Did you depose these witnesses?

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, Individually and as the Successor In Interest to the Estate of JOHN JOSEPH WAYNE WATKINS, Plaintiffs, v. LARRY DEPEE, STATE OF CALIFORNIA, and DOES 1 through 100, Inclusive, Defendants.	Case No. C-05-1143-SI [The Honorable Susan Illston] **MOTION FOR PARTIAL NEW TRIAL ON DAMAGES** HEARING: , 2007 TIME: 8:30 A.M. ROOM: 10, 19th Floor (Filed Aug. 29, 2007)

TO DEFENDANTS STATE OF CALIFORNIA AND LARRY DEPEE, AND TO THEIR ATTORNEYS OF RECORD:

As soon as counsel may be heard by the above-entitled Court, located at 450 Golden Gate Avenue, 19th Floor, San Francisco, California, Plaintiff SYLVIA MAHACH-WATKINS will and hereby moves the Court for an order for a partial new trial on the damages and for an order excluding evidence regarding decedent's mental health history, history of drug use, and history of arrests convictions and other contacts with law enforcement (collectively, "Evidence"). This motion is brought on the following grounds:

* * *

[6] 2. The Purpose of California's Wrongful Death Statute is to Provide Compensation for Loss of Companionship.

The Purpose behind wrongful death statute is to provide compensation for loss of companionship. *Phraner v. Cote Mark, Inc.*, 63 Cal.Rptr.2d 740, 742 (1997). Recovery for loss of affection and society in a wrongful death action fulfills a deeply felt social belief that a tortfeasor who negligently kills someone should not escape liability completely, no matter how unproductive his victim. *Borer v. American Airlines, Inc.*, 563 P.2d 858, 866 (Cal.,1977). The loss of comfort, protection, and society of a deceased has an actual value which cannot be compensated by nominal damages. *Duclos v. Tashjian*, (1939) 90 P.2d 140, 145, 32 Cal.App.2d 444; *Gilmore v. Los Angeles Ry. Corp.*, (1939) 295 P. 41, 211 Cal. 192.

Here, the jury returned verdict of one dollar for the loss of comfort, protection and society of the decedent. This is contrary to California law. Loss of society cannot be compensated by nominal damages. The defendants cannot escape liability completely no matter how unproductive their victim was portrayed to be. The purpose of California's wrongful death statute is not fulfilled by this verdict of nominal damages. A miscarriage of justice has occurred.

Accordingly, the motion for a partial new trial should be granted.

3. The Jury Instruction for Nominal Damages on the 1983 Cause of Action was Erroneous.

Erroneous jury instructions, as well as the failure to give adequate instructions, are grounds for a new trial. *Murphy* @ [sic] 187. Here, the instruction to the jury that it could only award nominal damages on a Section 1983 wrongful death cause of action is inconsistent with Section 1983 policies of compensation and deterrence. "It defies history to conclude Congress purposely meant to assure the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil right statutes against the peril of death. *Brazier v. Cherry*, 293 F.3d 401, 404. Clearly, the plaintiff was entitled to an instruction of compensatory damages on her son's Section 1983 wrongful death claim. An instruction for only nominal damages sends a message to other law enforcement officers that if there is any doubt in their mind that they may have violated a citizen's civil rights they will be better off financially if they just finish their victim off.

[7] Accordingly, the motion for a partial new trial should be granted.

D. Conclusion.

Plaintiff has been substantially prejudiced by the admission of evidence regarding the decedent's mental health history, drug use and contacts with law enforcement. A miscarriage of justice has resulted

because no life is worth only one dollar. Lastly, the jury instruction for only nominal damages on the Section 1983 wrongful death action is erroneous and is inconsistent with its policies of compensation and deterrence.

Accordingly, the motion for a partial new trial should be granted.

DATED:
August 29, 2007

LAW OFFICES OF
TORY M. PANKOPF

BY: /S/
TORY M. PANKOPF,
Attorneys for Plaintiff

DATED:
August 29, 2007

BEATIFICATO &
ASSOCIATES

BY: /S/
MARY HELEN BEATIFICATO,
Attorneys for Plaintiff

APPENDIX G

NO. 08-15694

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYLVIA MAHACH-WATKINS, Individually and as the Successor In Interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff-Appellee,

v.

LARRY DEPEE and the STATE OF CALIFORNIA,

Defendants-Appellants.

On Petition to Appeal from a Judgment of the
United States District Court
Northern District of California
D.C. No. 3:05-cv-1143-SI
THE HON. SUSAN ILLSTON

SUPPLEMENTAL EXCERPTS OF RECORD

VOLUME I

* * *

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYLVIA MAHACH-WATKINS, individually, and as the successor in interest to the Estate of JOHN JOSEPH WAYNE WATKINS,

Plaintiff,

v.

LARRY DEPEE and THE STATE OF CALIFORNIA,

Defendants. /

No. C 05-1143 SI

ADVICE TO COUNSEL RE: DAMAGE INSTRUCTIONS

(Filed Aug. 9, 2007)

The final damages instructions are attached. After further consideration of the matter, the Court concludes that the damages available under the Section 1983 excessive force/wrongful death claim are those set forth in California's survival statute, Cal. Code Civ. Proc. § 377.34. *See generally Venerable v. City of Sacramento*, 185 F. Supp. 2d 1128, 1131-33 (E.D. Cal. 2002). California's survival statute does not allow recovery for the decedent's loss of enjoyment of life, or the decedent's pain and suffering, and thus the Court's Section 1983 instruction does not include those damages. Under the facts of this case, the available Section 1983 damages consist of nominal and punitive damages.

Accordingly, the Court has modified the draft instructions to provide separate instructions on the Section 1983 claim and the state wrongful death

claim. The Court has also revised the instructions to clarify the availability of nominal damages under both claims.

IT IS SO ORDERED.

Dated: August 9, 2007

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge